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Supreme Court of the United States

OCTOBER TERM, ~~1952~~ 1953

No. ~~746~~ 9

JULIUS EMSPAK,
Petitioner,

v.

UNITED STATES OF AMERICA.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

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Supreme Court of the United States

OCTOBER TERM, 1952

No. 796

JULIUS EMSPAK,
Petitioner,

v.

UNITED STATES OF AMERICA.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

To the Honorable the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

JULIUS EMSPAK, the petitioner herein, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia entered on the 19th day of December, 1952 (R.365) affirming petitioner's judgment of conviction in the United States District Court for the District of Columbia.

Opinions Below

The opinion of the Court of Appeals (R.363-64) has not yet been reported. The opinions of Judge Kirkland denying certain pre-trial motions made by petitioner and 15 other individuals who were indicted for contempt of Congress appear at 95 F. Supp. 1010 and 1012. The opinion of Judge Letts (R. 224-227) rendered at the conclusion of the trial and holding the petitioner guilty is unreported.

Jurisdiction

The judgment of the Court of Appeals was entered on December 19, 1952. A petition for rehearing was denied on April 13, 1953. The jurisdiction of this Court is invoked under 28 U. S. C., Section 1254.

Statutes, Resolutions and Rules Involved

1. 2 U. S. C. § 192; R. S. § 103, as amended June 27, 1938, c. 594, 52 Stat. 942.

> *Refusal of witness to testify.* Every person who having been summoned as a witness by the authority of either House of Congress to give testimony or to produce papers upon any matter under inquiry before either House, or any joint committee established by a joint or concurrent resolution of the two Houses of Congress, or any committee of either House of Congress, willfully makes default, or who, having appeared, refuses to answer any question pertinent to the question under inquiry, shall be deemed guilty of a misdemeanor, punishable by a fine of not more than $1000 nor less than $100 and imprisonment in a common jail for not less than one month nor more than twelve months.

2. H. Res. 5, 79th Cong., 1st Sess., 91 Cong. Rec. 10, 15 (January 3, 1945).

> Resolved, That the rules of the Seventy-eighth Congress be, and they are hereby, adopted as the rules of the Seventy-ninth Congress.
>
> That rule X of the Rules of the House of Representatives is amended by adding after clause 40a of the first paragraph a new clause to read as follows:
>
> '40b. On Un-American Activities, to consist of nine members.'

Rule XI of the Rules of the House of Representatives is amended by adding after clause 40a two new clauses to read as follows:

'40b. To Un-American Activities—to the Committee on Un-American Activities.

'40c. The Committee on Un-American Activities, as a whole or by subcommittee, is authorized to make from time to time investigations of (1) the extent, character, and objects of un-American propaganda activities in the United States, (2) the diffusion within the United States of subversive and un-American propaganda that is instigated from foreign countries or of a domestic origin and attacks the principle of the form of government as guaranteed by our Constitution, and (3) all other questions in relation thereto that would aid Congress in any necessary remedial legislation.

'The Committee on Un-American Activities shall report to the House (or to the Clerk of the House if the House is not in session) the results of any such investigation, together with such recommendations as it deems advisable.

'For the purpose of any such investigation, the Committee on Un-American Activities, or any subcommittee thereof, is authorized to sit and act at such times and places within the United States, whether or not the House is sitting, has recessed, or has adjourned to hold such hearings, to require the attendance of such witnesses and the production of such books, papers, and documents, and to take such testimony, as it deems necessary. Subpoenas may be issued under the signature of the chairman of the Committee or any subcommittee, or by any member designated by any such chairman, and may be served by any person designated by any such chairman or member.'

3. Rules of Criminal Procedure:

Rule 6. The Grand Jury.

(b) OBJECTIONS TO GRAND JURY AND TO GRAND JURORS.

(2) *Motion to Dismiss.* A motion to dismiss the indictment may be based on objections to the array or on the lack of legal qualification of an individual juror, if not previously determined upon challenge. An indictment shall not be dismissed on the ground that one or more members of the grand jury were not legally qualified if it appears from the record kept pursuant to subdivision (c) of this rule that 12 or more jurors, after deducting the number not legally qualified, concurred in finding the indictment.

Rule 12. Pleadings and Motions Before Trial; Defenses and Objections.

(b) THE MOTION RAISING DEFENSES AND OBJECTIONS.

(1) *Defenses and Objections Which May Be Raised.* Any defense or objection which is capable of determination without the trial of the general issue may be raised before trial by motion.

(2) *Defenses and Objections Which Must Be Raised.* Defenses and objections based on defects in the institution of the prosecution or in the indictment or information other than that it fails to show jurisdiction in the court or to charge an offense may be raised only by motion before trial. The motion shall include all such defenses and objections then available to the defendant. Failure to present any such defense or objection as herein provided constitutes a waiver thereof, but the court for cause shown may grant relief from the waiver. Lack of jurisdiction or the failure of the indictment or information to charge an offense shall be noticed by the court at any time during the pendency of the proceeding.

(3) *Time of Making Motion.* The motion shall be made before the plea is entered, but the court may permit it to be made within a reasonable time thereafter.

(4) *Hearing on Motion.* A motion before trial raising defenses or objections shall be determined before trial unless the court orders that it be deferred for determination at the trial of the general issue. An issue of fact shall be tried by a jury if a jury trial is required under the Constitution or an act of Congress. All other issues of fact shall be determined by the court with or without a jury or on affidavits or in such other manner as the court may direct.

Summary Statement of the Matter Involved

Petitioner, Julius Emspak, is the General Secretary-Treasurer of the United Electrical, Radio and Machine Workers of America (R. 160), hereafter referred to as UE or the Union, a national labor union representing employees in the electrical, radio and machine industry. He appeared on December 5, 1949 before a one-man Subcommittee of the Committee on Un-American Activities of the House of Representatives consisting of Representative Morgan M. Moulder (R. 159, 239).

During the course of the hearings petitioner was asked approximately 239 questions. These questions dealt with the position of the witness, his background, the structure of the Union, the extent of its membership and bargaining commitments, the number of its organizers, the manner of their appointment, the composition of the Executive Board, the number of the Union's international representatives and their duties, the duties of the Union's Executive Committee, the manner in which grievances are adjusted, the official publication of the Union, the alleged similarity in policy between the Union publication and the Communist

Party, the signing by the witness of a non-Communist affidavit which was filed with the National Labor Relations Board, and related matters. The witness answered all of these questions fully and frankly (R. 159-199).

Included within the 239 questions which the witness was asked were a series of approximately 68 questions which are set out in counts 1-68 of the indictment for violation of Section 192, Title II, U. S. C. which was returned against petitioner by a grand jury empaneled on October 3, 1950 (R. 4-13).

Of these 68 questions some 58 sought from the witness information as to the identity of and his acquaintance with certain named individuals. Two counts in the indictment (counts 59 and 60) were based upon the witness' refusal to answer questions concerning his affiliation with two organizations, the National Federation of Constitutional Liberties and the Civil Rights Congress (R. 12). The remaining counts in the indictment (61-68) are based upon the witness' refusal to answer certain questions with respect to his alleged membership in the Communist Party (R. 12-13).

At the outset of the series of questions which gave rise to the indictment petitioner, when asked to identify a particular individual, stated as his reason for declining to answer (R. 168):

> "Because of the hysteria, I think it my duty to endeavor to protect the rights guaranteed under the Constitution, primarily the first amendment, supplemented by the fifth."

Thereafter, in response to similar questions, he referred back to this answer.

When it became apparent that he would be asked a series of questions requiring him to identify various Union officials, he amplified his original answer by stating (R. 171):

> "Mr. Chairman, on these questions, which are all essentially the same, of course, when this hearing was announced according to the press reports, at least, it

was announced because this committee presumably was interested in finding out things with reference to individuals in our oganization by using whatever means it has at its disposal, and for the purpose of trying to perhaps frame people for possible criminal prosecution.

"I don't see how or why an individual should be subjected to that kind of questioning here if he is going to maintain, you know, his feelings on these questions, and I tried to express the feeling before when you interrupted me. I just don't intend, as I said then, to be a party to any kangaroo court proceedings of this committee or any other congressional committee. I think I have the right to reserve whatever rights I have in that respect to whatever appropriate bodies may be set up to deal with questions that come up."

The press reports referred to by the witness in the above-quoted explanation deal with statements attributed to the House Committee on Un-American Activities to the effect that the Committee decided to investigate the non-Communist affidavits which the Union officers had previously filed pursuant to the Taft-Hartley Act (R. 39-42).

Petitioner was asked shortly after giving the above answer whether it was his feeling that to reveal his knowledge of others would subject him to criminal prosecution and he replied (R. 172):

"No. I don't think this committee has a right to pry into my associations."

All of the petitioner's subsequent answers which form the basis of the indictment were justified for the reasons which he had previously given. At the conclusion of the hearing the witness was told by the Sub-Committee chairman that he had not been "accused of anything" (R. 191).

On December 17, 1950, petitioner filed a motion to dismiss the indictment and for other appropriate relief upon the grounds, *inter alia*, that the indictment violated the constitutional privilege against self-incrimination contained in the Fifth Amendment to the Constitution (R. 14-17).

The motion further sought dismissal of the indictment, or in the alternative a hearing, on the ground that there were less than 12 members of the Grand Jury which voted the indictment who were impartial and free from prejudice and bias against the defendant.

Petitioner attached to the motion a series of affidavits dealing both with the claim of privilege as well as with the contention that the Grand Jury was illegally constituted. Thereafter, petitioner filed a supplementary affidavit attacking the qualifications of the grand jurors (R. 85).

On January 19, 1951, Judge Kirkland granted the Government's motion to strike certain of the affidavits and attached exhibits dealing only with the claim of privilege upon the ground that they were not appropriate to be considered in connection with pre-trial motions. On the same day Judge Kirkland, apparently *sua sponte,* struck as legally insufficient petitioner's supplementary affidavit on the qualifications of the grand jurors (R. 115-116). Thereafter petitioner made an offer of proof of the allegations of fact set forth in the affidavits theretofore filed on the qualifications of the grand jurors (R. 235-236).

On January 26, 1951, Judge Kirkland handed down an order and opinion holding, *inter alia,* that neither the circumstances recited in the motion to dismiss nor those referred to in the offer of proof with respect to the qualifications of the Grand Jury justified granting the relief requested by petitioner (R. 116; 95 Fed. Supp. 1010).

Thereafter, on January 31, 1951, Judge Kirkland filed a second opinion holding that the counts involved in the instant indictment, as well as several others with which he dealt simultaneously, "apparently on their face were directed to one single line of inquiry which was a specific phase of inquiry then being considered by the Committee" (R. 119; 95 Fed. Supp. 1012).

After a trial without a jury before Judge Letts, the petitioner was found guilty of contempt as charged and sentenced to imprisonment for a period of six months and a fine of $500 (R. 233).

After an appeal was argued in October 1951 before the judges of the lower court, reargument was *sua sponte* ordered before the court *en banc*. After reargument in May, 1952, the Court of Appeals on December 19, 1952, handed down its opinions. The opinion of the court was written by Judge Clark for himself and judges Miller and Proctor. A concurring opinion was written by Judge Prettyman for himself and Judges Stephens and Washington. Judge Bazelon dissented for himself and Judge Edgerton while Judge Fahy concurred in part and dissented in part.*

Questions Presented

1. Whether petitioner asserted the Fifth Amendment privilege against self-incrimination in response to certain questions put to him by a Subcommittee of the House Committee on Un-American Activities.

2. Whether a witness before a Congressional committee must be specifically directed to answer by the Committee before he can be held in violation of Title 2, Section 192.

3. The court below refused to rule that a witness must be specifically directed to answer before he can be held in default, but apparently did rule that such a witness must be apprised in some fashion that the Committee intends that he should answer despite his objections; this requirement fixes the deliberate and intentional character of the refusal and is an element of the offense. Two questions are presented by this ruling:

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* Some of the issues were further discussed in *Quinn* v. *U. S.*, and *Bart* v. *U. S.*, cases in which review is also being sought in this Court.

(a) Whether a new trial should have been granted and the case remanded so that the trier of the facts might apply the principles laid down in the opinion.

(b) Whether, if it was appropriate in a criminal case to rule on this issue for the first time on appeal, the court below was in error in finding that petitioner was made aware of the intention of the Subcommittee that he answer despite the grounds he advanced for refusing.

4. Of the twenty members of the indicting Grand Jury, ten were Government employees and, in addition, two were wives of Government employees. A question is presented as to whether a motion for a hearing to investigate the qualifications of the Grand Jury was improperly denied in the face of a detailed offer of proof and affidavits showing the existence of a climate of opinion among Government employees that they would jeopardize their tenure or provoke investigation by failing to indict petitioner at the Government's request.

5. Whether House Resolution 5, as construed and applied herein, abridged the petitioner's freedom of speech, press and assembly in violation of the First Amendment to the Constitution.

6. Whether the First Amendment protects a witness before a Congressional committee against the compulsory disclosure of the identity of trade union officials with whom he is associated and of his political views and affiliations.

Reasons for Granting the Writ

1. Since almost all indictments for contempt of Congressional committees are brought in the District of Columbia the rulings of the lower court with respect to the questions presented here will inevitably exert an influence far beyond the confines of this case. The lower court's

rulings decide important questions of substance with respect to the construction of the Constitution which have not been but which should be settled by this Court. Questions with respect to the conduct of Congressional committees and the rights and obligations of witnesses before such committees have acquired increasing importance in recent times. The systematic use of the investigative process against individuals as such rather than for the purpose of obtaining information for legislative purposes has brought into focus a host of important problems which must be authoritatively settled by this Court.

2. This Court has never dealt with the question concerning the form and manner in which the privilege against self-incrimination must be expressed in order to give protection to the individual pleading the privilege before a congressional committee. The circumstances relevant to a disposition of this issue in this case are the following.

The petitioner as well as his Union and its other officers had for a long time been accused by congressional committees and in particular the House Committee on Un-American Activities of Communism and of affiliation with Communist organizations (R. 241-245).

The hearings which resulted in the indictment of the petitioner as well as the indictment of the petitioner in No. 795, this Term, were frankly labeled hearings regarding "Communist infiltration". They contain detailed testimony charging petitioner and a great number of other Union officials with Communism or affiliation with Communist organizations (R. 246, 276-350).

Almost all of the individuals referred to in Counts 1-58 of the indictment had been, prior to the hearing at which petitioner was interrogated, listed as Communists or as affiliated with Communist organizations in publications of the House Committee on Un-American Activities and the House Labor Committee (R. 68-85, 246-248).

In addition, the organizations which are referred to in Counts 59 and 60 of the indictment had been the subject of similar charges (R. 250-251).

On October 14, 1949 petitioner had signed and filed NLRB Form 1081, "Affidavit of Non-Communist Officers" in which petitioner swore (R. 350-351):

> "The undersigned, being duly sworn, deposes and says I am the responsible officer of the Union named below. I am not a member of the Communist Party or affiliated with such party. I do not believe in and I am not a member of nor do I support any organization that believes in or teaches the overthrow of the United States Government by force or any illegal or unconstitutional method."

The vast incriminating scope of this oath need hardly be emphasized in view of the False Claims Act (18 U. S. C. 1001) to which the affidavit on its face specifically calls attention (R. 351). It need only be pointed out that it greatly exceeds in scope even the Smith Act which does not reach such matters as "belief" or "support". And while the Smith Act is addressed only to force and violence, this provision embraces "any illegal or unconstitutional method" of overthrowing the Government.

After the filing of the affidavit by petitioner and prior to his appearance before the Committee, the General Counsel of the National Labor Relations Board referred the affidavit to the Department of Justice for investigation as to whether it presented a violation of Federal laws (R. 254).

Several weeks before petitioner's appearance before the Committee a newspaper announced that, according to a spokesman for the Committee, the purpose of the inquiry was an investigation into the affidavit which petitioner had signed (R. 253, 39-40).

Less than a week after this statement concerning the purpose of the subpoena appeared in the daily press, an

article appeared stating that the Department of Justice was preparing "for speedy action on some cases referred to it * * * involving union officials who have signed non-Communist affidavits under the Taft-Hartley Law". The news item referred specifically to petitioner. It stated that he had filed a non-Communist affidavit, that the House Committee had listed petitioner as a Communist and that petitioner was to appear before the Committee the following week (R. 41-42). In the course of the hearing petitioner was expressly questioned concerning his affidavit (R. 194).

To all this need be added only the fact that petitioner had been identified as a Communist by Louis Budenz * in the course of the trial which had resulted in the conviction of the 11 Communist leaders (R. 57-60, 253-254; *Dennis* v. *U. S.*, 339 U. S. 162).**

These objective circumstances establish the peril of prosecution to which the questioning exposed petitioner. More relevantly this setting of extreme peril both broadened the witness' latitude as to the manner and form of his assertion and obviated the necessity for more explicit formulation by the witness to the Committee of the reasons for his answers. Compare *United States* v. *Skinner*, 218 Fed. 870, 880. See also *United States* v. *Elton*, 222 Fed. 428 (S. D. N. Y.) and *United States* v. *Eisele*, 52 Fed. Supp. 105 (D. C. Dist. Col.).

3. At the very first indication on the part of the Committee that the witness' answers might involve association with specific individuals charged with being Communists,

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* Budenz had also so identified petitioner in Congressional hearings. It was largely upon the basis of the testimony of Budenz that legislative justification was found for the affidavit provisions of the Taft-Hartley Act. See *CIO* v. *Douds*, 339 U. S. 382, footnote 4.

** It is hardly surprising that on the floor of Congress members of the committee frankly conceded the incriminating character of the questions (R. 251-52).

petitioner asserted and claimed his privilege under the Fifth Amendment. Thus the witness specifically stated (R. 168):

> "Because of the hysteria, I think it my duty to endeavor to protect the rights guaranteed under the Constitution, primarily the Fifth Amendment supplemented by the Fifth Amendment. This committee will corrupt those rights."

He explained to the Committee that the line of questioning that "counsel was developing now has been used on numerous occasions by this Committee and other Congressional Committees in the attempt to harass the Union, its leadership and its members."

The court below based its ruling that the privilege had not been asserted (and indeed the trial court as well (R. 225)) upon these preliminary responses alone. We believe that these responses are sufficient to assert the privilege.

4. The petitioner, however, did not confine his responses to the answer quoted above. He made it explicit when the Committee continued to press him that the reasons for his refusal were based upon his fear that an attempt was being made, as press reports had predicted, to elicit information to be used in a criminal prosecution against him (R. 171):

> "Mr. Chairman, on these questions, which are all essentially the same, of course, when this hearing was announced according to the press reports, at least, it was announced because this Committee presumably was interested in finding out things with reference to individuals in our organization by using whatever means it has at its disposal and for the purpose of trying to frame people for possible criminal prosecution."

This claim of protection under the Fifth Amendment based upon a fear of a "possible criminal prosecution" was again repeated when counsel for the Committee in accordance with the Committee's announced purpose of inves-

tigating the validity of the affidavit which petitioner had submitted under the Taft-Hartley Act pressed the witness on this subject. He stated (R. 194): "I further understand what the motives of this committee are, to establish a beautiful frame to hang people who try to comply with the law."

Throughout the entire course of the questioning the petitioner consistently referred back to his original claim of protection under the Fifth Amendment. When petitioner responded with "I answered that", at one point when an incriminating question was put to him, Congressman Moulder said: "You mean you refuse to answer for the same reasons you gave at the beginning." The defendant replied: "That is correct; I answered the best way I know how" (R. 194).

Thus the witness' entire testimony is unified by a claim of protection under the Fifth Amendment based upon the stated fear that his answers might be used against him in a "possible criminal prosecution".

5. The decisions of this Court have insisted upon the fundamental importance of the privilege against self-incrimination under our constitutional system. See *Blau* v. *U. S.*, 340 U. S. 159; *Blau* v. *U. S.*, 340 U. S. 333; *Hoffman* v. *U. S.*, 341 U. S. 479; *U. S.* v. *White*, 322 U. S. 694, 698; *Feldman* v. *U. S.*, 322 U. S. 487, 489; *Twining* v. *U. S.*, 211 U. S. 78, 91. The court below did not give the Fifth Amendment a "liberal construction in favor of the right it was intended to secure" as the *Hoffman* case requires. It withheld a liberal construction from petitioner's assertion, apparently on the ground that the *Hoffman* case did not involve a contested assertion.

6. Because the incriminating area embraced petitioner's political views and affiliations, it is neither surprising nor hostile to his assertion of the plea of the privilege against self-incrimination that the witness referred not only to the

Fifth Amendment but to the First Amendment. There is a close relationship between the reasons which brought the privilege against self-incrimination into being and the nature of the rights protected by the First Amendment. See *Wood* v. *U. S.*, 128 F. 2d 265, 268, 278, 279 (C. A. D. C.), and *U. S.* v. *St. Pierre*, 152 F. 2d 837, 842. And apart from this the law is clear that reliance upon reasons in addition to possible self-incrimination cannot serve to dissolve the protection of the Fifth Amendment. Compare the *St. Pierre* case, *supra*, where a witness, when asked why he refused to answer a question, stated: "It was 95% fear of revenge and 5% fear of self-incrimination". The Court of Appeals held that this circumstance did not operate to deprive the witness of the privilege.

7. In a number of companion cases involving officers or members of the Union, trial courts ruled that reliance upon comparable expressions constituted valid assertions of the privilege against self-incrimination.

One such case is *U. S.* v. *Fitzpatrick*, Criminal No. 1743-1950, 96 F. Supp. 491, involving Thomas J. Fitzpatrick, the chief steward of Local 601 of the Union.

Mr. Fitzpatrick appeared before the same committee as that which found petitioner in contempt, the Un-American Activities Committee. See Petition in *Quinn* v. *United States*, No. 795, this Term. After preliminary matters had been disposed of, Mr. Fitzpatrick stated his position in advance with respect to questions which the Committee thereafter might ask (at p. 602): *

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* For the convenience of the Court we have appended below two supplements to this brief. Supplement I is a series of unreported opinions involving the privilege against self-incrimination which were handed down by the District Court in a number of companion cases. Supplement II reproduces parallel testimony of union officers before the House Un-American Activities Committee. Relevant portions of the remainder of the Fitzpatrick testimony are set forth in Supplement II at p. 29.

"I will answer all honest questions put to me, but I have no intention of joining with the people who seek to destroy the Constitution of this country, whether witnesses or anybody else. To me, the Constitution of this country is not a scrap of paper. It is something to be maintained. I have two sons. I want them to have the same freedoms and rights that I have enjoyed. If I can't leave this world a better world, I want to leave it just as good.

"The Constitution of this country provides certain protection for minorities and gives the privilege for people to speak and think as they felt that they should and want to. It gives the privilege that people can have opinions or beliefs that may be unpopular. In my opinion, it gives them the right to hold those opinions secret, if they so desire. This is a protection of the first amendment to the Constitution, supplemented by the fifth amendment."

In his opinion in the *Fitzpatrick* case, 96 F. Supp. 491, Judge Morris refused to permit the fact that the witness relied upon considerations in addition to those arising out of the Fifth Amendment to cancel the claim of privilege. He stated that "* * * this misapprehension (with respect to the applicability of the First Amendment) on the part of the defendant in no way vitiates his right to the protection under the Fifth Amendment if he sufficiently made such claim". The court's analysis with respect to the sufficiency of the claim is, we submit, wholly dispositive of the issue which is here in focus. The court stated (at 493):

"The Fifth Amendment to the Constitution provides, among other things, that 'no person * * * shall be compelled in any criminal case to be a witness against himself * * *.' The other provisions of that Amendment obviously have no relation to this controversy, and the provision mentioned is the one that has been construed to justify a witness in any proceeding in declining to answer any question that would tend to incriminate him, or expose him to prosecution for the crime. There can be no doubt that this protection extends to a witness testifying before any judicial, congressional or administrative body of the United States Government, although, apparently, there has been misapprehension

> on the part of some that it does not. The use, therefore, by the defendant of the term 'Fifth Amendment' could only have reference to this provision therein, and unless by some explicit statement that he was not claiming the protection of that provision of the Constitution, it would seem sufficient to put the Committee on notice that he was asserting such claim."

Judge Morris insisted (*ibid.*) that the manner of the assertion cannot be divorced from the objective circumstances:

> "* * * Where a witness, such as the defendant here, has claimed the protection of the Fifth Amendment, and that in a setting in which he has been denounced, by other witnesses testifying, as a communist, where testimony by other witnesses, if believed, shows that he has been active in organizing and directing a communist organization (that is, the Union), where the statutes then in force make it a criminal offense to do such things, and where prosecutions have been instituted against those who are charged with doing them, it seems to me to be clear that the Committee was put on ample notice that the defendant apprehended that the answers to the questions involved in this indictment would furnish information which could be used in the prosecution of him in a criminal case under existing federal statutes, and for that reason, as well as for other reasons which were not well founded, declined to answer the questions. *Blau* v. *United States,* 340 U. S. 159."

The circumstances which the court thus described as conveying reasonable notice that Fitzpatrick, a shop steward of a local union of the UE, claimed the privilege applies even more appositely to the situation of petitioner, the Secretary-Treasurer of the International Union, who had been repeatedly denounced as a Communist by other witnesses before the Committee and officially by the Committee itself.*

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* In the case of petitioner there is, as we have noted, an additional and special set of circumstances, even more favorable to his assertion, which arose out of the investigation of his affidavit under the Taft-Hartley Act.

In *U. S.* v. *Panzino*, Criminal No. 1747-1950, Supplement I, p. 1, Judge Goldsborough ruled that a similar formulation constituted an effective assertion of the privilege against self-incrimination. Likewise in *U. S.* v. *Matles*, Criminal No. 1745-50, Supp. I, p. 11, Judge Letts who was the trial judge in the instant case found reliance upon the First and Fifth Amendments to constitute a valid assertion of the privilege against self-incrimination.*

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* The court reached this conclusion by probing "the mental operations of Representative Moulder". Judge Letts stated that the primary question was whether Representative Moulder understood the defendant's reference to the Fifth Amendment and further whether such reference adequately conveyed to the Representative that the defendant was invoking his constitutional privilege against self-incrimination. In order to justify the acquittal in the *Matles* case, in the face of the conviction here, Judge Letts ruled that, though the language used by the witness was inadequate to convey an assertion, Representative Moulder nevertheless managed to grasp that an assertion had been made. In reaching this conclusion, Judge Letts pointed to the fact Representative Moulder, upon being told that the witness relied on the First and Fifth Amendments (Supplement I, p. 13),

> "then inquired 'In what respects do they justify your refusal to answer the question'. And the defendant replied: 'I am so advised by counsel.' At this point Mr. Scribner, counsel for the defendant, who was present, volunteered: 'I will be happy to give the basis for that if you wish, Mr. Congressman'."

The court concluded upon the basis of the above colloquy that since "the suggestion of defendant's counsel was not adopted and he was not invited to explain further the position of the defendant in relying upon the First and Fifth Amendments", therefore, "Representative Moulder understood the position of the defendant and the purpose of the objections that had been made."

But this is the same Representative who only a little while earlier had heard petitioner, the witness immediately preceding Matles, use almost the same language to claim privilege. If he was aware that the words "First and Fifth Amendments" constituted an assertion, he must have had a similar awareness when the witness Emspak used the expression "the First Amendment supplemented by the Fifth."

The inescapable fact is that the words which the witness Matles used, in the context of the objective circumstances, were adequate to convey the assertion and that similar words and circumstances require the same conclusion here. There is no basis whatsoever

8. The court below in reaching the conclusion that the petitioner had failed to assert the privilege after adverting to the fact that he referred to the "First Amendment, supplemented by the Fifth" stated:

> "Later, on being asked if he felt answers to certain questions would subject him to criminal prosecution, he not only replied in the negative, but he also added: 'I don't think this committee has a right to pry into my associations. That is my position.'"

But the court could not attribute to this answer a significance which dominates and indeed overrides the remainder of the witness' testimony and its context. As we have noted Judge Kirkland had ruled that all of the questions addressed to the petitioner were parts of a single line of inquiry. If the questions addressed to petitioner cannot be considered in isolation from the entire inquiry, neither may the answers. An analysis of the entire line of inquiry establishes that petitioner asserted the privilege and that Representative Moulder was aware that the privilege was being claimed.

Thus, when the witness asserted his privilege in response to an incriminating question with respect to Joseph Persily, he was asked precisely the same kind of question with respect to another Union organizer, Albert Smith. Although the witness referred back to his earlier answer in declining to answer the question concerning Smith, he was nevertheless asked whether Max Helford had ever been connected with the UE as a field organizer. It was in response to this third attempt to incriminate him that the

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for attributing to Representative Moulder a comprehension of what was being claimed in the *Matles* case and an ignorance of what was being claimed in the *Emspak* case. Indeed the record in this case contains a more explicit indication than is presented by the *Matles* record, that Representative Moulder knew that the witness had claimed his privilege. See R. 191.

witness made explicit the basis for his claim of privilege, namely the fear of criminal prosecution for perjury.

When the pattern of the questioning revealed that petitioner was being asked to identify individuals who had been accused by the Committee of being Communists, he charged that all of the questions which had been put by the chairman were motivated by the Committee's purpose to identify individuals as Communists for possible criminal prosecution under the affidavit provisions of the Taft-Hartley Act. He suggested that the questions bore out the press reports which have already been referred to and which announced that such would be the purpose of the interrogation. He stated his refusal to permit himself thus to be victimized: "I think I have the right to reserve whatever rights I have in that respect to whatever appropriate bodies may be set up to deal with questions that come up."

Although the witness thus expressly stated the basis for his claim of privilege and of his fear, Representative Moulder persisted in arguing with the witness in an obvious attempt to force out of him the incriminating information which the Committee sought. It was in response to the attempt to probe further into the basis for the claim that the witness gave a negative reply upon which the Government relies.

Before the witness left the stand, Representative Moulder stated to him that he had "not been denied any constitutional rights or privileges" and that he had not been accused of "anything". Representative Moulder thus sought to reassure the witness that his fears were groundless and that his constitutional rights to be free of self-incrimination had not been invaded. The Subcommittee thus patently recognized that the witness had asserted the privilege and that he had not abandoned it, for if the Subcommittee was under the impression that the witness had

not relied upon the privilege, it would hardly have become necessary to tell him that he had not been accused of anything.

A significant series of questions terminated the line of inquiry. The witness was bluntly asked whether he had recently signed a non-Communist affidavit with the NLRB, and was thereafter asked whether he was a member of the Communist Party. In response to this apparent attempt to lay the basis for a perjury charge against the witness, the witness communicated in unmistakable language his fear that the inquiry was designed to lay the basis for a perjury prosecution.

Despite this clearly communicated expression of fear, the Committee, pursuing its earlier tactics of attempting to wring admissions from the witness in the face of an assertion of the privilege, nevertheless asked him whether he was a member of the Communist Party at any time before he signed the affidavit, whether he ever paid Communist Party dues, whether he ever signed an application to join the Communist Party, whether he ever registered as a member of the Communist Party, and whether he ever attended the trial of Earl Browder at the Communist Party headquarters in New York City. To all of these questions the witness simply replied: "I answered that". When the Subcommittee asked: "You mean you refused to answer for the same reasons you gave at the beginning?" the witness replied: "That is correct. I answered the best way I know how." Thus, the witness concluded his examination by a reliance upon the same assertion which he made when the Committee first touched upon the incriminating subject-matter.

When petitioner's responses are considered together as an integrated response to a single line of inquiry, there cannot be any question that he explained the phrase, "First Amendment, supplemented by the Fifth Amendment" to mean a claim of the privilege based upon the fear of being "framed" "for possible criminal prosecution". He used

this expression on two occasions to convey the fear that his answer would be used to lay the basis for a perjury prosecution under Section 9(h) of the Taft-Hartley Act. The court below therefore fell into serious error in dealing with petitioner's answer to a single question in isolation. When the ultimate facts were sought to be elicited, the petitioner plainly expressed his fear of prosecution. It was these questions which were put to petitioner which establish the purpose of the entire inquiry, namely, his associations and membership in the Communist Party. The answers to those questions plainly convey a fear of prosecution and constituted an adequate assertion of the privilege against self-incrimination with respect to the entire line of inquiry.

9. The court below wholly overlooked the fact that the question in response to which the petitioner stated that he did not fear criminal prosecution was asked after the witness had already expressed a fear of prosecution. But the committee was not free, after a valid assertion was made to probe the reasons underlying the assertion as it sought to do here. See *Hoffman* v. *United States, supra, United States* v. *Weissman,* 111 F. 2d 260 (C. A. 2) and *United States* v. *Hashmall,* Criminal No. 1752-50, Supp. I, 25.*

10. If as we contend the petitioner had, prior to the answer in question, adequately asserted the privilege and if he had also asserted it subsequent thereto, an important

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* In any event the answer was perfectly consistent with petitioner's claim of Fifth Amendment protection. It might well have been true that acquaintance with the two named individuals would not have directly subjected the defendant to criminal prosecution. The Fifth Amendment protection is, of course, more extensive. As the Court stated in *Blau* v. *United States, supra:*

> "Whether such admissions by themselves would support a conviction under a criminal statute is immaterial."

As long as "answers to the questions asked * * * would have furnished a link in a chain of evidence needed in a prosecution of petitioner", the Fifth Amendment protection was available to the petitioner. *Blau* v. *United States, supra.*

issue of law arises as to whether this answer may be deemed to be an abandonment or a waiver of the privilege. This Court has repeated frequently that there can be no waiver of the claim of Fifth Amendment protection by a witness unless through his testimony in that proceeding the witness' voluntary testimony constitutes an admission or showing of guilt. *Arndstein* v. *McCarthy*, 254 U. S. 71, and *McCarthy* v. *Arndstein*, 262 U. S. 355. See, also, *Smith* v. *United States*, 337 U. S. 137; *Rogers* v. *United States*, 340 U. S. 367; *United States* v. *St. Pierre*, *supra*. The courts must "indulge every reasonable presumption against waiver of fundamental constitutional rights", *Johnson* v. *Zerbst*, 304 U. S. 458, and may not "presume acquiescence in the loss of fundamental rights". *Glasser* v. *United States*, 315 U. S. 60. In the latter case the Court held (at p. 70):

> "To preserve the protection of the Bill of Rights for hard-pressed defendants we indulge every reasonable assumption against the waiver of fundamental rights."

11. The court below held that a specific direction to answer is not a prerequisite to a conviction for contempt. However, a majority of the court below acknowledged that a witness before a Congressional committee who raises some objection must be apprised clearly that the Committee intends that he answer despite his objections.

There are a large number of circumstances under which the mere failure to answer a question put by a Congressional committee is not in itself a sufficient basis for invoking the criminal law. It would serve no purpose exhaustively to analyze all of these circumstances here. It is sufficient to state that one of these circumstances comes into being when a witness raises serious objections to answering.* A majority of the court below recognized—and

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* Compare *Jones* v. *Securities and Exchange Commission*, 298 U. S. 1:

> "The citizen when interrogated about his private affairs has a right before answering to know why the inquiry is made; and if the purpose disclosed is not a legitimate one, he may not be compelled to answer."

this wholly apart from whether petitioner asserted the Fifth Amendment privilege—that petitioner's objections were of an order which required some dispositive action by the Committee before he could be held in violation of the criminal law.

The classic manner in which Congressional committees reject the objections of a witness has been by specifically directing the witness to answer. When in 1857 Congress enacted the contempt statute to supplement its inherent powers the practice had been either explicitly to direct the witness to answer or to inform him in comparably clear terms that a refusal would result in contempt proceedings. Section 192 of Title 2 of the Criminal Code punishes every person who "refuses to answer". The legislative history of Section 192 establishes that in passing the statute Congress did not intend to confer new powers upon Congressional committees or inflict any additional burdens on witnesses. See the concurring opinion of Judge Bazelon (Slip Opinion, 24-32), in *Quinn* v. *United States*, supra. Therefore, the term "refusal" must be construed to contain within it the prerequisite of a direction or an explicit warning that contempt might ensue in the event of a failure to answer the question.

In three recent district court cases, the court has assumed that a direction to answer or its equivalent is a prerequisite to contempt. In *United States* v. *Browder*, D. D. C., Criminal No. 1784-50 (March 14, 1951), the court, in acquitting the defendant of contempt of Congress, said:

> "A search of the record will not disclose one instance when the Committee or its presiding member overruled the defendant's objections (based on pertinency) or offered to set him right if, perchance, his observations were ill founded or his position untenable in the eyes of the Committee.
>
> * * * * * *

> "His obections were not acted upon and he had the right to believe that his views and explanations were acceptable to the Committee."

This view was followed in *United States* v. *Fox,* D. D. C., Criminal No. 1798-50 (June 29, 1951), where the Court observed that "there is no reason why a different procedure (from that pursued in the courts) should be permissible in cases involving contempt of Congress."

And again in *United States* v. *Kamp,* 102 F. Supp. 757 (D. D. C. 1952), the Court declared:

> "Committees of Congress must conduct examinations in such a manner that it is clear to the witness that the Committee recognizes him as being in default * * *. The witness is not required to enter into a guessing game when called upon to appear before a committee. The burden is upon the presiding member to make clear the directions of the committee, to consider any reasonable explanations given by the witness, and then to rule on the witness' response."

See also *Bryan* v. *United States,* 339 U. S. 323.

Perhaps the most compelling indication that the congressional committees translate their obligation to overrule objections to questions into a directive to answer is the current practice of the committees themselves. Thus the Senate Judiciary Committee and the House Un-American Activities Committee now follow this practice.* The ruling of the court below will inevitably invite an abandonment of this practice.

12. It seems plain that a majority could not be formed in the lower court in support of the direction requirement

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* See Hearings Before the Sub-Committee to Investigate the Administration of the Internal Security Act and other Internal Security Laws of the Committee on the Judiciary, U. S. Senate, 82nd Cong., 1st Sess., Part I, July 26, 1951, pp. 75-76 and the concurring opinion of Judge Bazelon on the *Quinn* case.

only because they regarded it as too rigid a formula. However, the majority did agree that petitioner must be clearly apprised that his questioner rejects his objections and intends that he answer. The record totally fails to meet this standard. The concurrence which deals with the question in this case offers no support for its conclusion that "The evidence is ample that Emspak was made well aware that the Subcommittee desired answers to its questions despite the grounds he advanced for refusing".*

It would appear that the lower court requires that the citizen's rights be asserted with an overpowering roar but permits his interrogator's responsibilities to be met with an indistinguishable mumble.**

13. Confining ourselves to this issue, it seems plain that the lower court should have remanded the case to the trial court with instructions to acquit. At a minimum, it was required to permit the trier of fact to resolve the issue. The issue involved is a central issue in the case, namely, the intent of petitioner. Thus, in the *Quinn* case the lower court ruled that an awareness of the intention of his inquirer that answers be given despite the objections of the witness is indispensable in establishing the intentional and deliberate character of the defendant's act. "The deliberate and intentional character of the refusal is an element of the offense, to be determined from all the circumstances by the trier of the facts." In the present case the trier

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* *U. S.* v. *Bart, supra,* also contains the unparticularized assertion, although in a less absolute form than here, that the petitioner here was made aware of the attitude of the Committee, "certainly as to some of the questions".

** In rejecting the validity of petitioner's assertion the lower court referred to his experience and ability as a guidepost to what might be expected of him; but it failed to mention the parallel fact that the Committee has heard thousands of witnesses and that it knows how to reject objections when it desires to do so.

patently did not apply this standard.* And the reviewing court likewise improperly permitted its own views with respect to petitioner's guilt to substitute for a trial and an appeal, in the event of a conviction. Compare *Bollenbach* v. *United States*, 326 U. S. 607, and *Weiler* v. *United States*, 323 U. S. 606.**

14. There were twenty members of the indicting Grand Jury who voted on petitioner's indictment. Counsel for the Government has conceded that ten of these Grand Jurors were Government employees and two additional were wives of Government employees (R. 238). Petitioner moved under Rule 12 of the Federal Rules of Criminal Procedure for a hearing on his motion to dismiss the indictment as void in that there were not 12 duly qualified and impartial jurors. *Crowley* v. *United States*, 194 U. S. 461; *U. S. ex rel. McCann* v. *Thompson*, 144 F. 2d 604 (C. A. 2); 18 U. S. C. A. 554a; Rule 6(a)(2), Federal Rules of Criminal Procedure. The district court by Kirkland, J., denied the request for a hearing and rejected petitioner's proffer of proof in support of the motion (R. 118). The Court of Appeals upheld the district court's denial of a request for a hearing, although no majority could be found to support any one basis for this refusal.

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* As Judge Bazelon's dissent indicates the reason why the trial court did not apply the standard was its excessive preoccupation with petitioner's attitude. The trial court gave a dominant emphasis to petitioner's "pique", his "defiance", his "challenge" to the Committee's powers, his "distrust" of its aims and good faith. We believe that the court distorted the witness' attitude and ignored the background of the relationship of the Union and the Committee which understandably had embittered petitioner, a leader of the Union. Apart from this, it seems plain that the court by yielding to its distaste for the witness' manner failed to give him the benefit of an adequately protective legal standard.

** The lower court recognized in the companion *Quinn* case that the issue of the witness' awareness that he was required to answer despite his objection was for the trial court for it remanded on this very issue.

This Court held in *Dennis* v. *United States*, 339 U. S. 162, that Government employees serving as Grand or Petit Jurors will be barred as a group for bias when circumstances are brought to the court's attention demonstrating that Government employees would not be suitable jurors in a particular case.

In *Dennis*, the petitioner urged that Government employees should have been barred from the jury under the special circumstances of his case. The majority of this Court held that such bias must appear from the record and could not be the subject of judicial notice. The concurring opinion of Justice Reed, without which there was no majority, sharply emphasizes the holding of *Dennis*:

> "Mr. Justice Reed concurs in the opinion and judgment of the Court. He reads the Court's decision to mean that Government employees may be barred for implied bias when circumstances are properly brought to the court's attention which convince the court that Government employees would not be suitable jurors in a particular case. Absent such a showing, however, Government employees may not be barred from jury service merely because they are Government employees."

The *Dennis* majority went still further and indicated the precise type of evidence which would ground an exclusion of government employees from jury duty:

> "As far as it appears, the court was willing to consider any evidence which would indicate that investigatory agencies of the Government had recognized in the past or would take cognizance in the future of a vote of acquittal, but no such proof was made. Nor was there evidence of a climate of opinion among Government employees that they would jeopardize their tenure or provoke investigation by such a verdict."

In the instant proceeding the petitioner offered to prove the precise factual condition laid down in *Dennis* as a pre-

requisite for barring Government employees as jurors—namely the existence of a climate of opinion among Government employees that they would jeopardize their tenure or provoke investigation by failing to indict this defendant at the Government's request. Petitioner submitted two affidavits (R. 25, 85) in support of this factual allegation and incorporated these affidavits in a proffer of proof at the argument on the motion for a hearing under Rule 12 (R. 237).*

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* Petitioner offered to prove the following allegations of fact to the Court:

1. Ten of the twenty grand jurors voting on the indictment were Government employees (App. 86). Two other jurors were wives of Government employees (App. 86).
2. Government employees at the time of the indictment and for a number of years previous have been the subject of an active campaign to determine whether they are in any way sympathetic or tolerant to Communists or any person associated with Communists or with any organization charged to be a "Communist front" (App. 86).
3. At the time of the indictment, Congressional leaders, Congressional committees and heads of Federal executive agencies were engaged in efforts to "purge" from Government employment any person found to be so stigmatized (App. 87).
4. Under the President's Loyalty Order, Executive #9835, Government employees are subject to the most intensive and searching investigation of all of their conduct, beliefs and associations involving in the remotest manner sympathy with persons or organizations charged to be Communistic (App. 88).
5. At the very time that the Grand Jury in this proceeding was considering whether to return indictments, the United States Civil Service Commission reported publicly that 280 Government employees had already been dismissed as "security risks" under the loyalty program; that 13,202 employees had been the subject of a full and complete investigation by the Federal Bureau of Investigation; that 1593 employees had resigned while under FBI investigation and that 1171 employees had left their Government jobs before the loyalty investigation had been completed (App. 91).
6. The actual conduct of the loyalty review boards has been such as to create the distinct impression among Government employees that the only way a Government employee can safeguard his livelihood is to express active hostility to any

In addition to the specific allegations of fact set forth in petitioner's affidavits and incorporated in the proffer of proof, petitioner attached a number of exhibits to the affidavits containing statements by experts, all tending to show that:

1. Because of the general atmosphere of intimidation, Government employees have "a low morale" (R. 96) due to the fear that they will be called to account for any activity or expression of opinion indicating the slightest sympathy with any person charged with being a Communist (R. 96).

2. Government employees as a result of this atmosphere are frightened, "upset and scared" (R. 98).

3. All Government employees know the type of investigation made in loyalty cases and therefore assume that any type of activity or expression of opinion which expresses sympathy for ideas or individuals charged with being Communists provides grounds for suspicion of their own "loyalty" (R. 102).

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idea, person or organization which might possibly be attacked as Communist (App. 91-92).

7. Numerous articles in the public press and reports over the radio concerning intensive nature of the loyalty investigation have engendered fear and apprehension among Government employees as to the retention of their jobs as a means of livelihood (App. 90).

8. The transcript of the hearing before the House Committee on Un-American Activities was before the Grand Jury during their deliberations. This transcript revealed to the Grand Jurors that the defendant was charged with contempt of the House Committee on Un-American Activities and was being investigated by the House Committee for alleged Communist activities (App. 86).

9. The House Committee on Un-American Activities has been extremely active in this investigation of alleged disloyalty among Government employees and has publicly announced that its files and reports have been used by the investigating

4. The loyalty program is and has been used unjustly and upon the slightest provocation as a means of depriving Government employees of their jobs (R. 105).

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agencies of the Federal Government to determine the loyalty of Government employees (App. 87).

10. At the time of the Grand Jury hearings and a number of years prior to that, a number of committees of Congress in addition to the Un-American Activities Committee, have conducted intensive investigations into the loyalty of Government employees (App. 92).
11. There had been attempts at public intimidation of jurors and Federal judges in proceedings involving alleged Communist activities (App. 88).
    a) A resolution was introduced in Congress demanding the investigation of the presiding justice in the first Hiss trial, impugning his loyalty solely because he attempted to exercise the functions of his office to the best of his ability (App. 88).
    b) One of the jurors who refused to vote for conviction of Hiss was required to appeal to law enforcement agencies for protection against individuals harassing him because of his vote (App. 88).
    c) When the Court of Appeals for the Ninth Circuit granted bail to Harry Bridges, accused of Communist affiliation, a resolution was introduced in the Senate demanding investigation of these jurists (App. 88).
12. The Federal Bureau of Investigation had investigated and checked every Federal grand juror who was a Government employee. This individual's employment is conditioned upon a favorable report from that agency which is a subdivision of the prosecutor's office (App. 94).
13. The Department of Justice announced that the Federal Bureau of Investigation was engaged in the greatest man-hunt among Federal Civil Service employees that this country has ever engaged in (App. 93).
14. Information concerning loyalty of the grand jurors who are Federal employees was available to the Attorney General's office prior to the time the grand juror was sworn in (App. 94).
15. Each and every grand juror who is a Government employee remains under the surveillance of the FBI during his entire employment by the Government (App. 95).
16. The Director of the Federal Bureau of Investigation stated publicly that whenever a Federal employee is accused of "Communist affiliations", whether or not such accusations are based on fact, a full scale investigation is instituted by the Bureau (App. 93).

5. The Federal Bureau of Investigation investigates every detail of the private lives, opinions, activities, reading habits and thoughts of an individual involved in a Government employee loyalty check. The FBI uses every technique, including wire-tapping and anonymous informants (R. 108).

6. As a result of these facts, prominent observers of the Washington scene have concluded that "suspicion and uncertainty" becloud Government service today (R. 110).

These allegations of fact describe in the greatest detail a climate of opinion among Government employees that "they would jeopardize their tenure or provoke investigation", by any conduct which might be considered favorable to this petitioner. Upon such a showing, under the rule of *Dennis,* the indictment would have to be dismissed.

Despite this showing, Judges Clark, Miller and Proctor upheld the denial of a hearing holding that:

> "The affidavits which he (the petitioner) submitted to support his motion for hearing had as his sole basis the argument that Government employees on the Grand Jury were incapable of reaching an unbiased decision, and they did no more than assert existence of a 'miasma of fear' so clearly rejected under the Dennis case. Without more, there was no ground upon which an order for hearing might be founded, and there was no error in the finding thereof" (R. 354-55).*

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* The district court refused to hear the evidence offered, denied petitioner's motion for a hearing, struck *sua sponte* from the record the main affidavit containing the allegations of fact, and rejected petitioner's proffer of proof made in open court (R. 118). A refusal to hear evidence offered in support of allegations that a grand or petit jury was improperly or illegally constituted is reversible error. *Carter* v. *Texas,* 177 U. S. 442; *Smith* v. *Mississippi,* 162 U. S. 592; *Tarrance* v. *Florida,* 188 U. S. 519; *Glasser* v. *U. S.,* 315 U. S. 60, 87; *Morford* v. *U. S.,* 339 U. S. 258.

The rejection of a proffer of proof made in open court in support of a motion to dismiss an indictment for improper constitution of grand or petit juries is likewise reversible error. *Carter* v. *Texas, supra; Brownfield* v. *South Carolina,* 189 U. S. 426; compare *Glasser* v. *U. S., supra.*

It is impossible to reconcile the holding of these three judges with either the majority or the concurring opinion in *Dennis*. The *Dennis* majority specifically indicates the nature of the evidence which the Court has held will be received. Petitioner's offer of proof set forth in great detail evidence "which would indicate that investigatory agencies of the Government had recognized in the past or would take cognizance in the future of a vote of acquittal". The offer of proof furthermore was designed to adduce "evidence of a climate of opinion among Government employees that they would jeopardize their tenure or provoke investigation by such a verdict." Judges Clark, Miller and Proctor state that an assertion of the "existence of a 'miasma of fear' " was "clearly rejected in the Dennis case." These judges, we suggest, misread the *Dennis* case. The majority of the Court in Justice Minton's opinion, did not "reject" a proffer of a "miasma of fear". The majority refused to take "judicial notice" of such a "miasma" (at p. 172). This petitioner has done the very thing which the *Dennis* case authorizes. He has offered to prove the existence of this "miasma of fear". Unless the *Dennis* opinion has no longer any efficacy whatsoever, petitioner should have been permitted to make his proof in a proper hearing.*

The concurring Judges, Prettyman, Washington, Chief Judge Stephens and Fahy do not read the *Dennis* case as do Judges, Clark, Miller and Proctor. These members of the Court of Appeals assume for the purposes of this case that the concurring opinion of Mr. Justice Reed in *Dennis* is "an accurate summation of the opinion of the Court" and sum-

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* The Government suggested in the argument before the Court of Appeals that bias even if proved would not disqualify the Grand Jury. As the concurring opinion of Judge Bazelon points out: "What the government is proposing is *pro tanto* repeal of the Fifth Amendment's assurance of "a presentment or indictment in a Grand Jury" (R. Opinion 105). It seems clear that bias and partiality resulting from fear induced from an atmosphere of intimidation would destroy petitioner's "Federal constitutional right to a fair and impartial Grand Jury." *Cassell* v. *Texas*, 339 U. S. 282.

marize the rule of *Dennis* in the following manner: "The question before us is whether circumstances were brought to the trial court's attention which demonstrated that government employees would not be suitable grand jurors in the particular case" (R. 359).

The concurring Judges therefore have not rejected petitioner's contention that the rule of *Dennis* permits the defendant in a criminal proceeding to challenge the indicting grand jury by offering evidence tending to show that a "miasma of fear" had "developed among government employees in the District of Columbia which caused such employees to come reasonably to the conclusion that any action by them which could be considered sympathetic toward the person accused of offenses arising out of the investigation of Communist activities would endanger their government employment" (R. 360). The concurring Judges do not hold that petitioner's offer of proof is insufficient in law. To the contrary, they indicate that such an offer might be sufficient in "other cases and other circumstances" (R. 361).

The concurring members of the court base their affirmance here on the assumption that in this particular case there was no area of discretion for the Grand Jury. They emphasize that the following circumstances were "brought to the Court's attention" upon the motion:

> "1. The fact that the charge before the Grand Jury was that appellant refused to answer certain questions, and (2) the fact that appellant said he had refused to answer this question" (R. 362).

These Judges conclude, as a result of these two circumstances, that this Grand Jury was not called upon to evaluate the probabilities of a "doubtful *prima facie* case or of a charge in the realm of opinion or controversy" (R. 362). The concurring Judges conclude that since the only contested issue before the Grand Jury was the claim of constitutional privilege and that since this was a matter of "defense of justification" (R. 362), the Grand Jury could do nothing under these circumstances except to indict.

We suggest that this conclusion of Judges Prettyman, Washington and Chief Judge Stephens joined in by Judge Fahy in his concurring in part, dissenting in part opinion * is in conflict with their own opinions in *Quinn* v. *United States*, decided concurrently.

In *Quinn*, Judges Prettyman, Washington and Chief Judge Stephens hold that "the deliberate and intentional character of the refusal is an element of the offense to be determined from all the circumstances by the trier of the facts" (Quinn opinion, p. 9) and point out in amplification that "to constitute an offense, refusal to answer must be intentional" and that " it must appear that [defendant] was aware of the intention of his inquirer that the answers were required despite his objections" (Quinn opinion, pp. 9, 10). We assume, for the purposes of this petition, that the discussion of Judges Prettyman, Washington and Chief Judge Stephens represents the opinion of the Court on the question of "direction". To hold that a *prima facie* case of violation of the statute is present, a grand jury must therefore consider whether it appears from the evidence that the witness "was aware of the intention of his inquirer that answers were required despite his objections." Thus the lower court now holds that this is not a matter of "defense of justification", but rather *"an element of the offense"*. Hence this is an issue which the Grand Jury would have had to consider in deciding whether there was a *"prima facie"* case of violation of statute.

We suggest therefore, that the opinion of Judges Prettyman, Washington and Chief Judge Stephen on the decisive issue of the "deliberate and intentional character of the refusal" as an element of the offense indicates on its face that there was in fact an area of discretion before the Grand Jury. The Grand Jury might have concluded on the basis of the record that the petitioner was not "aware of the intention of his inquirer that answers were required despite his

* See also Judge Fahy's concurrence in *Quinn*.

objections". That this was a reasonably possible conclusion for an impartial trier to arrive at is evidenced by the remand in *Quinn* which instructs the trial court to consider this very point.

A subsequent decision of the Court of Appeals, *Bowers* v. *United States*, decided February 12, 1953, further indicates the inherent conflict in the opinion of the concurring judges. In *Bowers*, the Court of Appeals held that pertinency is a material ingredient of an offense under the contempt statute. If pertinency is a material ingredient of the offense, this, too, must be shown to the Grand Jury in demonstrating the existence of a *prima facie* case. Thus, at a minimum the Grand Jury which considered petitioner's indictment had before it two areas of discretion: (1) the presence or absence of an awareness of the intention of the inquirer that answers were required despite objections as well as (2) the presence or absence of the ingredient of pertinency. Thus, it seems clear that the rule of *Dennis* would be totally frustrated by implying as the concurring judges below do, that it is applicable to all except this case, since here, the Grand Jury could do nothing under these circumstances except indict. It is clear that the indicting Grand Jury in this cause should have considered the presence or absence of several important ingredients of the offense. Under such circumstances there is no justification whatever for refusing to follow the mandate of this Court in *Dennis*.

In *Quinn*, Judge Bazelon in a careful opinion concurred in by Judge Edgerton indicates his conclusion that the lower court has misread *Dennis*. Judge Bazelon concludes after a full analysis that the rule of *Dennis* required the granting of petitioner's motion for a hearing on the question of the Grand Jury. The opinion of Judge Bazelon highlights the fundamental considerations involved in this question. This Court has held that the Grand Jury is "one of the securities to the innocent against hasty, malicious and oppressive public prosecutions", *Ex parte Bain*, 121 U. S. 1, and that the Grand Jury "is designed as a means

not only of bringing to trial persons accused of public offsenses upon just grounds, but also as a means of protecting the citizen against unfounded accusations, whether it comes from Government or be prompted by partisan passion or private enmity." *Ex parte Bain*, supra, p. 11. As Judge Bazelon points out:

> "Preservation of the integrity of the grand jury system is no more a matter of individual concern. It touches our democratic insistence on the fair administration of law. When the grand jury is not properly instituted 'reversible error does not depend on a showing of prejudice in an individual case the injury is not limited to the defendant—there is injury to the jury system, to the law as an institution, to the community at large and to the democratic ideal reflected in the processes of our courts. Ballard v. U. S., 329 U. S. 187, 195'."

Sharp division within the Court of Appeals on this question, the lack of a firm majority of the court, and the inner contradictions in the opinion of the judges, all highlight the necessity for the granting of review. This Court has solemnly avowed in *Dennis* that "preservation of the opportunity to be heard is a guarantee of defendant's right to an impartial jury". If the opinions of the Court of Appeals stand unreviewed by this Court, this right becomes meaningless. The question here presented will continue to arise constantly in the District of Columbia unless resolved and we respectfully suggest that the present record affords the opportunity for a decisive solution by the Court.

15. The Court in *United States* v. *Rumely*, 345 U. S. 41, has indicated that Congressional resolutions which form the bases for investigative activities must be construed so as to harmonize their mandates with the First Amendment. See also the memorandum opinion of Judge Youngdahl in *United States* v. *Lattimore*, D. D. C. Criminal No. 1879-52, decided May 2, 1953. We do not intend here to reiterate arguments that have already been pressed upon

the Court in support of the view that the Resolution has been applied in violation of the First Amendment. Surely, the Court cannot ignore the fact that the obtaining of information for legislative purposes, the power in aid of which the Resolution was passed, has become a hollow pretext for the compilation of a vast political *index purgatorius*, the systematic destruction of political dissent and the subjection of thousands of citizens not merely to ruthless invasions of privacy but to serious sanctions without due process of law. Congressional committees now sit in judgment over the political liberty of the American people—teachers, writers, trade unionists, editors, preachers, doctors and just ordinary Americans.* We have reached the stage where a "clearance" from the Committee is often indispensable to one's livelihood, career and good name. The assertion by Congress of these powers to sit in political judgment must be reviewed by this Court. Unless these powers are curbed and constitutionally related to the legislative process, there is a serious danger of irreparable injury to our constitutional form of government.

The current hue and cry concerning Communism has converted the activities of Congressional committees into a vast game of hare and hounds. The only valid justification for these activities has been left far behind as the Congressional subpoena-mill grinds out its paper trail of pursuit. As new committees join in the chase and compete with one another, new abuses are perpetrated and ever new "sensational revelations" are promised to divert attention from those abuses. This process has now reached the point where the same individuals have been victimized

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* When protests are made that investigations invade constitutionally protected areas such as the schoolroom, the pulpit, or the lecture platform, the Committees reply that they are not concerned with what is taught or preached but rather with individual teachers, preachers or lecturers. Apart from the fact that inquisitions directed against individuals are a most effective way of censoring content, Congressional committees, as Chief Justice Miller reminded us a long time ago, were never intended to be "the Grand Inquest of the Nation."

over and over again and where to the invasions of the rights of the individual have been added serious attacks upon the principle of separation of powers.

CONCLUSION

The petitioner prays that a writ of certiorari issue to the United States Court of Appeals for the District of Columbia to review its judgment.

Respectfully submitted,

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SUPPLEMENT I

Unreported Oral Opinions by District Court in Companion Cases

IN THE

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA v. FRANK PANZINO, Defendant.	Criminal No. 1747-50

The above entitled matter came on for further consideration before Honorable T. Alan Goldsborough, United States District Judge, at 11:15 a. m., pursuant to adjournment.

ORAL CONCLUSIONS OF THE COURT

The Court: Gentlemen, the Court has given this matter a great deal of thought, and the Court has reached the conclusion that there should be, by the Court, a general discussion in order to make a proper background for the Court's decision, and in order that not only the Counsel but the public may understand in what metier the courts are working in a great many of these cases, which, so far as I know, have been brought down from the Congress.

The Court wants to discuss just what the settled law is about the operation of the Fifth Amendment, in so far as self-incrimination is concerned.

The law, as interpreted by the Supreme Court, has not changed for a period of 143 years. The leading case is

the case of the *United States* v. *Burr*, in which Burr's secretary was asked whether or not he interpreted and understood the purport of a letter in code which had been apparently physically written by him.

Chief Justice Marshall delivered the opinion in that case and said that if the question to the accused had been as to whether or not at the time the letter was written he knew an interpretation of the coded message, he could plead the protection of the Fifth Amendment, because it might have been held under those circumstances that he was guilty of misprision of treason, but as the question was not directed to what was in the letter at the time it was written and mailed, and whether he knew what was in it, what the translation was, at the time he was asked the question, and because that could not possibly make him—the answer to that question could not possibly make him liable to criminal prosecution, that the court would let him answer.

This is the general principle which was stated by Chief Justice Marshall and which has continued throughout the history of the country without any intermission between that time and the present date.

It will take me a few minutes to do it, but I am going to read a part of this opinion:

> "It is a settled maxim of law that no man is bound to criminate himself. This maxim forms one exception to the general rule, which declares that every person is compellable to bear testimony in a court of justice. Where the witness who considers himself as being within this exception, it is alleged that he is, and from the nature of things must be, the sole judge of the effect of his answer; that he is consequently at liberty to refuse to answer any question if he will say upon his oath that his answer to that question might criminate himself.
>
> "When this opinion was first suggested, the Court conceived the principle laid down at the bar to be too broad, and therefore required that authorities in support of it might be adduced. Authorities have been adduced and have been considered. In all of them the

Court could perceive that an answer to the question propounded might criminate the witness, and he was informed that he was at liberty to refuse an answer. These cases do not appear to the Court to support the principle laid down by the counsel for the witness in the full latitude in which they have stated it. There is no distinction which takes from the Court the right to consider and decide whether any direct answer to the particular question propounded could be reasonably supposed to affect the witness. There may be questions no direct answer to which could, in any degree, affect him; and there is no case which goes so far as to say that he is not bound to answer such questions. The case of *Goosely*, in this Court, is, perhaps, the strongest that has been adduced. But the general doctrine of the judge in that case must have referred to the circumstances, which showed that the answer might criminate him.

"When two principles come in conflict with each other, the Court must give them both a reasonable construction, so as to preserve them both to a reasonable extent. The principle which entitles the United States to the testimony of every citizen, and the principle by which every witness is privileged not to accuse himself, can neither of them be entirely disregarded. They are believed both to be preserved to a reasonable extent and according to the true intention of the rule and of the exception of that rule by observing a course which it is conceived courts have generally observed. It is this:

"When a question is propounded, it belongs to the court to consider and decide whether a direct answer to it can implicate the witness. If this be decided in the negative, then he may answer it without violating his privilege which is secured to him by law. If a direct answer to it may criminate him, then he must be the sole judge what his answer would be. The court cannot participate with him in this judgment, because they cannot decide on the effect of his answer without knowing what it would be; and a disclosure of that fact to the judges would strip him of the privilege which the law allows, and which he claims. It follows necessarily, then, from this statement of things, that if the question be of such a description that an

answer to it may or may not criminate the witness, according to that answer, it must rest with himself, who alone can tell what it would be, to answer the question or not. If, in such a case, he say upon his oath that his answer would criminate himself, the court can demand no other testimony of the fact. If the declaration be untrue, it is in conscience and in law as much a perjury as if he had declared any other untruth upon his oath, as it is one of those cases in which the rule of law must be abandoned, or the truth of the witness be received.

"The counsel for the United States have also laid down this rule according to their understanding of it; but they appear to the Court to have made it as much too narrow as the counsel for the witness has made it too broad. According to their statement, a witness can never refuse to answer any question unless that answer, unconnected with other testimony, would be sufficient to convict him of a crime. This would be rendering the rule almost perfectly worthless. Many links frequently compose that chain of testimony which is necessary to convict any individual of a crime. It appears to the Court to be the true sense of the rule that no witness is compellable to furnish any one of them against himself. It is certainly not only a possible but a probable case that a witness, by disclosing a single fact, may complete the testimony against himself, and to every effectual purpose accuse himself entirely as he would by stating every circumstance which would be required for his conviction. That fact of itself might be unavailing, but all other facts without it would be insufficient. While that remains concealed within his own bosom, he is safe; but draw it from thence, and he is exposed to a prosecution. The rule which declares that no man is compellable to accuse himself would most obviously be infringed by compelling a witness to disclose a fact of this description.

"What testimony may be possessed, or is attainable, against any individual, the court can never know. It would seem, then, that the court ought never to compel a witness to give an answer which discloses a fact that would form a necessary and essential part of a crime which is punishable by the laws."

Now, of course, that is not new law. That was a decision by Chief Justice Marshall which was handed down in

1807. But I do want to emphasize the fact that that is one construction of the application of the Fifth Amendment, so far as incrimination is concerned, which has never been deviated from by the Court in any case.

The case decided in 1892, which is a leading case, the case of *Counselman* v. *Hitchcock,* in which the defendant was asked whether or not he had received rebates, shipping rebates—a law had been passed making it unlawful to give rebates—and the Government contended that there was no law protecting rebates, and that therefore he should be compelled to answer, but the Supreme Court said that was not true; it said that if he admitted receiving rebates it might incriminate him—it must have been a conspiracy, or something of that kind—but, anyhow, he was not required to answer, and the Supreme Court in that case, which, as I say, was a leading case, and has been referred to by both Federal and State courts at length, just as Chief Justice Marshall's opinion, which I have just read, which was filed and handed down in June of 1807.

Now, in the *Patricia Blau* case, in which the Supreme Court handed down its opinion on December 11, 1950, the questions asked in that case were as follows:

> "Mrs. Blau, do you know the names of the State officers of the Communist Party of Colorado?
>
> "Do you know what the organization of the Communist Party in Colorado is, the table of organization of the Communist Party of Colorado?
>
> "Were you ever employed by the Communist Party of Colorado?
>
> "Did you ever have in your possession or custody any of the books and records of the Communist Party of Colorado?
>
> "Did you turn the books and records of the Communist Party of Colorado over to any particular person?
>
> "Do you know the names of any persons who might now have the books and records of the Communist Party of Colorado?
>
> "Could you describe to the grand jury any books and records of the Communist Party of Colorado?"

The Supreme Court by unanimous decision held that the witness could not be compelled to answer those questions. It called particular attention to the fact that at the time of the questioning the Smith Act was the law of the land. Now, the Smith Act is as follows:

> "Whoever knowingly or willfully advocates, abets, or teaches the duty, necessity, desirability, or propriety of overthrowing or destroying the Government of the United States or the government of any State, territory, district, or possession thereof, or the government of any political subdivision therein, by force or violence, or by the assassination of any officer of any such government; or
>
> "Whoever, with intent to cause the overthrow or destruction of any such government, prints, publishes, edits, issues, circulates, sells, distributes, or publicly displays any written or printed matter advocating, advising, or teaching the duty, necessity, desirability, or propriety of overthrowing or destroying any government in the United States by force or violence, or attempts to do so; or
>
> "Whoever organizes or helps or attempts to organize any society, group, or assembly of persons who teach, advocate, or encourage the overthrow or destruction of any such government by force or violence; or becomes or is a member of or affiliates with any such society, group, or assembly of persons, knowing the purposes thereof—shall be fined"

and so forth.

Now, it is perfectly evident in this case, and it is conceded by the Government, that the answer to all three questions asked, whether he at any time attended any Communist meeting with Tom Fitzpatrick, whether the defendant attended a Communist Party meeting with Charles Copeland, whether the defendant was or had ever been a member of the Communist Party, might each constitute incriminating matter, as interpreted in the *Burr* case, and, as I said before, as interpreted in every other case down to the present.

Now, in the case decided by the Supreme Court February 26, 1951, *Jane Rogers* v. *The United States,* the Court held that the witness should answer the question, for three reasons:

In the first place, the Court said that the defendant's decision not to answer the question was an afterthought;

Second, that she had answered several material questions; and that under the decision of the Supreme Court she could not stop then and decide whether or not she should answer other questions; and

Third, the Supreme Court said that the Smith Act was not on the statute books at the time of her interrogation but it expressly affirmed the *Patricia Blau* case, 340 U. S. 159, and held that questions connected with the Communist Party are subject to the privilege against self-incrimination as calling for disclosure of facts tending to incriminate under the Smith Act.

Now, a great many people have gotten the impression that in these cases—I am sure I cannot prove it, and I am not sure in this case, in some way or other—that the courts are winking at Communism.

The courts, in the first place, haven't anything to do with the policy of the law, as long as it is Constitutional law. What the courts have to do is enforce the law, certainly when it is perfectly clear what the law is.

Now, what I am about to say right now—I am just simply speaking for myself; I am not authorized to speak for any of the other members of this court or any other court—but my belief is, and, again, I cannot prove it; I only know what I think about it—my own opinion is this: That, knowing, as I do so well, the members of this court, that the views which I am about to express are their views.

A great many years ago I read everything that Karl Marx had to say, his Manifesto of 1848, and the main three volumes of Das Kapital.

Now, we have had, within the memory of all of us in this courtroom, three situations where we have had dictatorships. We have had one in Germany, what was known as

Nazism; we had in Italy what was known as Fascism; and we have in Russia what is known as Communism.

The Court thinks that there is no essential difference between one dictatorship and another. The Court thinks that in no dictatorship that it knows anything about has there been any ideology involved at all, and certainly the desire of the man and those immediately around him to have absolute control of everything that was within that jurisdiction. The Court thinks that there is no exception to this, and in every dictatorship, certainly every one that I have spoken of, the very first thing that is done is to destroy the labor unions, just destroy them, wipe them off the face of the earth.

The Court thinks that anyone who advocates Communism as Communism is practiced—I am not talking about Karl Marx' communism; I don't agree with Karl Marx but that is a very different thing from what is known as Communism at this time in the world.

The Court thinks that anyone who advocates Communism is just simply a sucker. Of course, attempts are made, with people who go to Russia, for instance, to show only the so-called bright side, but that is an old Russian trick for hundreds of years. Authentic history tells us that Catherine the Great, Empress of Russia—she understood there was a very bad condition down in Southern Russia, bordering on the Black Sea, and those who were interested in keeping the conditions as they were built false fronts along the coast of the Black Sea. After they got them built, they induced the queen to take a boat ride on the Black Sea and were able to fool Catherine the Great into thinking that conditions in southern Russia were good, instead of very, very evil.

This Court thinks that there are certain dicta—now, ordinarily a dictum is a mere flourish of the tongue which says something that people like to hear, but the Court thinks that there are certain dicta which are absolutely true and which will be true under all circumstances, and to the truth

of which there is nothing in history of the world as an exception.

> "Power always corrupts and absolute power corrupts absolutely."

Another:

> "There is no such thing as a benevolent despot."

Now, that is what this Court thinks about the situation.

But what the courts of this jurisdiction are doing now in cases where they have to direct a verdict for the defendant is to uphold the Constitution of the United States, which includes the Bill of Rights, which includes the Fifth Amendment, which states, in so far as this case is concerned:

> "No person * * * shall be compelled in any criminal case to be witness against himself * * *."

In this case the Government takes the position that this witness was simply a rebellious witness and took the position that the Congress had no right to investigate and that it was from that standpoint that he saw fit to decline to answer.

Well, now, he did take that position, but the Government said that in this case he did not claim the privilege under the Fifth Amendment. But he did not answer any question included in this indictment, which distinguishes it from that *Rogers* case.

Now, I don't know whether he knew what was in the Fifth Amendment or not, but what he said was this—this is his final answer, which involves his refusal to answer the questions:

> "I think again, Mr. Chairman, under the fifth amendment, that is my own personal belief."

Well, the Fifth Amendment contains this provision:

> "No person * * * shall be compelled in any criminal case to be a witness against himself * * *."

Now, the Government takes the position that, even though he invoked the Fifth Amendment, he did not know what he was invoking, and that, therefore, the Court has the right to say beyond all reasonable doubt that he did not invoke the privilege against self-incrimination.

Now, let's see about that. Now, here is a charge that I have given to the jury in a serious criminal case, and which, of course, I had to give myself when I took this case for trial, because I was sitting as a jury:

> "The Court charges you that the law presumes the defendant innocent until proven guilty beyond a reasonable doubt; if you can reconcile the evidence before you upon any reasonable hypothesis consistent with the defendant's innocence, you should do so, and in that case find him not guilty. You are further instructed that you cannot find the defendant guilty unless from all the evidence you believe him guilty beyond a reasonable doubt. The Court further charges you that a reasonable doubt is a doubt based upon reason, and which is reasonable in view of all the evidence. And if, after an impartial comparison and consideration of all the evidence, you can candidly say that you are not satisfied as to the defendant's guilt, you have a reasonable doubt, but if, after such impartial comparison and consideration of all the evidence, you can truthfully say that you have an abiding conviction of the defendant's guilt, such as you would be willing to act upon in the more weighty and important matters relating to your own affairs, you have no reasonable doubt.
>
> "It is not necessary that you should have a certainty, which does not belong to any human transaction whatever. It is only necessary that you should have that certainty with which you should transact your own most important concerns in my (sic) life."

Now, although he refused to answer these questions, the last thing he did say, he invoked the protection of the Fifth Amendment.

I am asked by the Government to decide that beyond all reasonable doubt he did not invoke the protection of the Fifth Amendment as to self-incrimination; and that the Court cannot do; and the Court grants the defendant's motion.

UNITED STATES DISTRICT COURT

DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA v. JAMES J. MATLES, Defendant.	Criminal No. 1745-50

Before Honorable F. Dickinson Letts, District Judge of the United States District Court for the District of Columbia,

OPINION OF THE COURT

Rendered Thursday, March 8, 1951

The Court is prepared to rule. What I wish now to say must not be regarded as the approval of this Court as to the manner and demeanor of the defendant when he appeared as a witness before the Congressional Subcommittee.

The Court thinks he was an obdurate witness and that he failed to show respect to the Congressional Subcommittee which the dignity of a Congressional Committee demands. Nevertheless, as I see the case, the central question is whether or not this defendant invoked his Constitutional privilege against self-incrimination. If he did that, he did it by mentioning the First and Fifth Amendments, and it would be simple enough for this Court to say that he has not invoked his privilege against self-incrimination, except for one part of the record.

As I have indicated in one other case, it seems necessary to view the questions and the responses given in the light of the setting when the questions were asked and the responses made and that includes the Committee itself.

In this case the Subcommittee was a Subcommittee of one, Representative Moulder, and it seems important, if you can, to understand the mental operations of Representative Moulder.

I think we have that when we look at one part of this record. It has been referred to by Counsel for the defendant, and it is a part of the record that I have given much thought to. The primary question is whether or not this defendant made known to Representative Moulder that his refusals to answer were upon his Constitutional rights as guaranteed by the Fifth Amendment. Did Representative Moulder understand the defendant's reference to the Fifth Amendment? If he did and understood that the defendant was invoking his Constitutional privilege against self-incrimination, then nothing further was required of the defendant to make his position clear and I am impelled to the belief that Representative Moulder did appreciate the defendant's position and the grounds upon which he purported to stand in refusing to answer the questions propounded.

I have mulled over the language which we find on page 856 of the record. Counsel for the committee propounded this question:

> "In 1933 you were an organizer for the Steel and Metal Workers Industrial Union, were you not?"

The Defendant: "My answer is the same."

Representative Moulder, who constituted the Subcommittee then inquired of the defendant:

> "You refuse to answer for the reasons stated, that it violates your rights provided under the Constitution?"

To which the defendant answered: "That's right."

Representative Moulder then asked: "What are those provisions, do you know?" And the defendant answered: "I believe the First and Fifth Amendments."

Representative Moulder then inquired: "In what respect do they justify your refusal to answer the question?"

And the defendant replied: "I am so advised by counsel."

At this point Mr. Scribner, counsel for the defendant, who was present volunteered: "I will be happy to give the basis for that if you wish, Mr. Congressman."

Now, the record indicates that the suggestion of defendant's counsel was not adopted and he was not invited to further explain the position of the defendant in relying upon the First and Fifth Amendments. That indicated to my mind that Representative Moulder understood the position of the defendant and the purport of the objections that had been made.

Upon the whole case the Court finds the defendant not guilty.

UNITED STATES DISTRICT COURT

DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA v. ESTHER TICE, Defendant.	Criminal No. 1751-50

Before Honorable James Kirkland, District Judge of the United States District Court for the District of Columbia

OPINION OF THE COURT

Monday, March 12, 1951

The Court: At this point, the Court will make the following findings of fact and conclusions of law.

The Court finds as a fact that the defendant in this cause, Esther Tice, was actually before the Committee on Un-American Activities of the House of Representatives; that she was before that committee in the District of Columbia on July 15, 1950; that she was there either by the service of a subpoena or by voluntary appearance, but at all events, she was before the committee.

The Court finds as a fact that the committee was then engaged in an inquiry pursuant to authority conferred upon the committee by law, and particularly subsection (q)2, Section 121, of the Legislative Reorganization Act of 1946, 60 Statutes at Large, page 828, and also in pursuance of House Resolution 5 of the 81st Congress.

The Court finds that on this occasion, there was a full quorum of the committee present, and that the defendant before the bar was asked the three questions which appear in the several counts forming a part of this indictment, and that she declined to answer those questions.

The Court finds that the three questions were pertinent to the inquiry for which the committee had been constituted and was then conducting hearings on this date, July 15, 1950.

As I say, the questions were pertinent and the defendant before the bar, the Court finds as a fact, refused to answer them.

The question is whether or not this defendant has claimed a privilege against such answering by virtue of the right imposed to her as a right of the United States under the Fifth Amendment to the Constitution.

The Court finds as a fact—and I merely elaborate on it because I think the answers must be taken in the light of the context of the inquiry—that the first question propounded to this witness was:

> "Do you know whether Maurice Horowitz was a member of the Communist Party?"

to which the defendant before the bar answered:

> "I am sorry. I am going to have to invoke my right under the first and fifth amendments to the Constitu-

tion at this time and refuse to answer on the grounds that it might incriminate me."

The first count of this indictment revolves around the next question asked:

"Do you know Robert Gunkel?"

The answer given was:

"Same answer," which the Court finds as a fact for the decision here relates back to the prior answer given to the initial question asked.

Then, the next count of this indictment is the third question: namely,

"Did Robert Gunkel attend meetings of the UE staff while you were field organizer?"

to which the answer given by the defendant before the bar was:

"I have given you the answer. The answer remains the same."

Again, the Court finds as a fact that the answer relates back to the first answer given and that it did involve the invoking by this defendant of her rights, particularly under the Fifth Amendment to the Constitution, which she elaborated by saying, "and refuse to answer on the grounds that it might incriminate me," which leaves no doubt in this Court's mind that it was the Fifth Amendment that she particularly relied upon; and for what it is worth, the Court will hold as a matter of law that the First Amendment, under recent decisions, has no application here.

The third count of this indictment appears as the fifth question asked in this particular colloquy, the question being particularly:

"Did Ruth Schecter come to the UE office and attend any meetings held there?"

The answer given by the defendant at the bar was:

"The same answer as before,"

which, again, the Court interprets to be a claim of her privilege under the Fifth Amendment, particularly her amplification that she refused to answer on the grounds that the question might incriminate her.

Not only is it clear to this Court that the witness before the subcommittee did make her claim of self-incrimination, but it was elaborated in the colloquy that follows a question as to whether the witness attended the Workers School in Cincinnati operated by Hy Lumer, where the witness—and it is a part of the record—stated:

> "I refuse to answer on the grounds that it might incriminate me."

Continuing further in the colloquy, she was asked by Mr. Walter the question:

> "By that do I understand you to mean that you refuse to answer on the ground that to answer the question might incriminate you?"

to which the defendant at the bar replied, "I do."

The Court therefore holds that the witness did invoke her privilege against incrimination, and the next problem is whether or not there was reasonable apprehension on her part to fear prosecution at the hands of the United States for a violation of a Federal statute.

The Court finds as a fact that this defendant had sat or been present for several days while testimony was being given before this particular subcommittee, and that she in particular had heard the witness Decavitch point her out and state, in substance, that "She is presently sitting in the room back there. I think she is knitting." She was also identified through a witness, Harry Fiering, as being a member of the Communist Party who would take discipline and orders.

In addition to that, the prosecutor in this cause, as has been his reputation for twenty-five years, was exceedingly careful of her rights, to be fair, so that even in the Government's case there was identified to the Court in this cause

the fact that one Robert Gunkel was at one time an organizer of the Communist Party in Ohio, and there was reference made while Mr. Tavenner was on the stand to a part of the record at page 2783, where the said Robert Gunkel was described as the head of the Communists in the Cincinnati area.

Again I say Mr. Murray was fair enough to bring out in the Government's case that the witness, Ruth Schecter, was deemed to be connected with the United Electrical Workers, and that there was testimony from the record given by Mr. Tavenner that a Miss Steinbacher, who gave considerable testimony before the subcommittee, had stated that when she, the witness, Miss Steinbacher, had entered the Communist cause or Party, she was "recruited into the Communist Party by Ruth Schecter."

It would appear to follow as a fair deduction from the testimony that Ruth Schecter was likewise a Communist or reputed to be a Communist in fact.

As against that, I think the case of *United States* vs. *Weisman*, 1940, 111 Fed. 2d 260, bears upon the issue of whether or not the defendant at the bar had reasonable apprehension to believe she was in danger of Federal prosecution.

The Court also believes that the case of *Counselman* vs. *Hitchcock*, *United States* vs. *Rosen*—the latter case being reported in 1949 at 174 Fed. 2d 187, certiorari denied 338 U. S. 851—that where there was evidence of an incriminating nature, the witness had a right, in the absence of proper immunity statute, to claim that personal privilege.

It has been argued that merely to say that one knows or does not know a person is not of itself incriminatory. However, the recent cases of *Alexander* vs. *The United States*, reported in 181 Fed. 2d 480, as well as *Kasinowitz* vs. *The United States*, and especially the case, of *Blau* vs. *The United States*, reported in 19 L. W. 4062, and decided December 11, 1950, seem clearly to be in point.

I think it would be controlling as a matter of law in this case to read that part of the Blau case which I feel is particularly applicable:

"At the time petitioner was called before the Grand Jury,"——

We could substitute, if you will permit me to interpolate, "At the time petitioner was called before the subcommittee."

"—the Smith Act was on the statute books, making it a crime, among other things, to advocate knowingly the desirability of overthrow of the Government by force or violence, to organize or help to organize any society or group which teaches, advocates, or encourages such overthrow of the Government, to be or become a member of such a group, with knowledge of its purposes.

"These provisions made future prosecution of petitioner far more than 'a mere imaginary possibility (*Mason* vs. *The United States*, 244 U. S. 362, 366).' She reasonably could fear that criminal charges might be brought against her if she admitted employment by the Communist Party or intimate knowledge of its workings."

Here, of course, if I may interpolate again, was presence with others, presence at meetings, as well as the question of intimate knowledge of the Communist Party and its workings.

Now, continuing with the *Blau* opinion:

"Whether such admissions by themselves would support a conviction under a criminal statute is immaterial. Answers to the questions asked by the Grand Jury would have furnished a link in the chain of evidence needed in a prosecution of petitioner for violation of (or conspiracy to violate) the Smith Act. Prior decisions of this court have clearly established that under such circumstances, the Constitution gives a witness the privilege of remaining silent. The attempt by the courts below to compel petitioner to testify runs counter to the Fifth Amendment as it has been interpreted from the beginning," citing among others, *Burr's Trial*, 25 Federal Cases, Page No. 14,692, decided by Chief Justice Marshall in the Circuit Court of the United States for the District of Virginia.

In the face of that decision, and while this Court holds no brief for the defendant and would feel in these days of danger to the national cause, that no one should decline to give to his government the information to enable that government perhaps even to exist, and certainly not to give aid and comfort to the enemy by remaining silent, nevertheless, in the spirit of a spread of nationalism, courts at the seat of government of the United States should be jealous to guard the individual rights of citizens to insure that even Satan himself would have a fair trial in the District of Columbia.

Therefore, having been present before a duly constituted subcommittee of the Un-American Activities Committee of the House of Representatives, who were then conducting an inquiry pursuant to the authority cited, the questions asked were pertinent; that this defendant did refuse to answer, and did refuse to answer by the force of her claim of self-incrimination; and that in line with the decisions of Justice F. Dickinson Letts in the case of *United States* vs. *Russell* and in the case of *United States* vs. *Matles*, it can be gathered from the circumstances, the background of the case, the context of the questions, that there has been shown by this defendant a reasonable apprehension of danger of prosecution by the Federal Government for a Federal law. The Court therefore concludes as a matter of fact and law that the motion for judgment of acquittal will now be granted.

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA v. EARL RUSSELL BROWDER, Defendant.	Criminal No. 1784-50

Washington, D. C.,
March 14, 1951.

The above-entitled action came on for further trial before the Honorable F. Dickinson Letts, United States District Judge, and a jury, at 10:15 o'clock a. m.

PROCEEDINGS.

The Court: The Court is prepared to rule on the defendant's motion for judgment of acquittal.

It is charged that the defendant refused to answer the sixteen questions specified in the indictment. The defendant's responses to such questions were in some instances in the nature of objections and expressions of the defendant indicating his claim of supposed rights. The Court thinks the committee members so understood defendant's answers to such questions. A search of the record will not disclose one instance when the committee or its presiding member overruled the defendant's objections or offered to set him right, if perchance, his observations were ill founded or his position untenable in the eyes of the committee. Indeed, in large part the committee must be regarded as respecting his sincerity in the expression of his views. The Court

thinks this a very considerate and proper attitude on the part of the committee. Perhaps as many as one hundred and forty or fifty questions were propounded which were fully and freely answered by the defendant without show of pique and with no attempt to evade the consequences of the information as imparted or any possible implications.

In viewing the few instances when it is said in the indictment the defendant refused to make responsive answers, it is noticed that the record reveals nothing of an obdurate nature in the manner and demeanor of the defendant. On the contrary, he made his objections in the way of observations which seemingly were acceptable to the committee, since on no such occasion was the defendant ordered or directed to make answer. It happened when one of the questions was asked the defendant was told by the interrogator that he might refuse to answer if that was his desire.

It is clear that the defendant was called as a witness on a very narrow issue at the behest of Senator McCarthy to refute the testimony of Professor Budenz. The examination was not so limited, although it is likely the interest of the majority of the committee was kept within the scope of such purpose. Simple justice and fairness require that the examination of the defendant be appraised in the light of that setting and that it be weighed as a whole and not as unrelated pieces. The questions and answers must be seen as links in a chain. It would not become this Court nor approach our vaunted concepts of justice to submit this case to the jury on doubtful technicalities. It is revealing to note that during the course of the examination the defendant persisted in knowing the attitude of the committee concerning his position in refusing to answer the several questions with which we are now concerned. At one point in the questioning the defendant replied:

> "If you are going to make an issue of this, let's have it out as to whether I have to disclose who was present when I met with the Government delegation from China to the United Nations. If I have to testify

> about that before this committee I think it is a question which should be very seriously considered and the committee itself should take a position."

It is certain that the committee at no time announced its opinion or conclusion as to the merits of defendant's objections.

It is asserted that a condition of confusion and discord prevailed in the committee. As the Court sees this, it makes little or no difference what the fact is in that regard. The Court is not concerned with any controversy as to whether the labors of the committee were performed in good faith to effectuate the purposes of the investigation or whether there was a concerted purpose to whitewash persons whose names had been brought into the hearings as has been asserted. It is more pleasing to this Court that the issues here presented be determined upon the record unclouded by politics or other extrinsic considerations.

That the questions propounded by Senator Hickenlooper as set out in the various counts of the indictment are of doubtful pertinency to the subject of the authorized investigation becomes clear, when the remarks of the Senator at the close of his interrogation of the witnesses are understood:

> "These questions, Mr. Chairman, that I have asked have the utmost pertinency to the direct and intimate subject matter of this resolution, and I should be glad to go into the matter with the committee a little more in detail. I assure you they have a direct bearing."

The Court concludes that the Senator suspected that the other members of the committee did not understand or see the relevancy of his questions. Notwithstanding his offer to explain such pertinency to the committee, the opportunity was not afforded him to reveal his purposes. It would be an unwarranted assumption to say that the witness understood what the members of the committee could not grasp and this makes more revealing the failure of the committee to rule on the defendant's objections or otherwise to en-

lighten him as to the pertinency of the questions and to advise him as to his obligations and his rights.

The witness informed the committee that he regarded the inquiry concerning individuals as the beginning of a fishing expedition. When under examination by Senator McMahon, the witness evinced a willingness to testify concerning the persons named by Senator Hickenlooper and, indeed, did give to Senator McMahon in a substantial way the information which Senator Hickenlooper had sought.

When Mr. Browder had been excused and when Chairman Tydings had thanked him for his cooperation, the Chairman said:

> "I would like to ask Senator Hickenlooper if, in that list of names that you read, many of which I have not heard of before, there are any employees who have been in the State Department or are now in the State Department, and if he will not give me those names so that I may see if we can reach an understanding and at the same time try to keep you in the character that you say you want to remain in."

Seemingly in replying to the chairman, Senator Hickenlooper said:

> "But every one of these questions that I have asked this witness has been asked for the purpose that I believe it can lead to information in connection with the State Department activities."

This indicates that Senator Hickenlooper had in mind that the interrogation might possibly lead to information in connection with the State Department activities. In these circumstances the Court thinks that the response of Senator Hickenlooper lends support to the belief of the witness that the Senator was embarking upon a fishing expedition.

At the very end of the examination Senator Tydings in effect relieved the defendant from any obligation to answer the questions which had been propounded to him concerning

individuals, except Vincent and Service, and as to them the defendant said:

> "To the best of my knowledge and belief, they never had any direct or indirect connection with the Communist Party."

The committee owed to the defendant a show of sincerity and frankness which was withheld unless indeed it acquiesced in his claim of privilege. His objections were not acted upon and he had the right to believe that his views and explanations were acceptable to the committee.

Viewing the case in the light of the event, the attending circumstances, the declared yet uncertain purpose of the committee, the make up of the committee, the defendant himself, who he was and had been, his behavior before the committee, and the obvious and obscure mental processes of persons concerned, the Court could not permit a verdict of guilty to stand.

The Court is prepared to grant defendant's motion for a judgment of acquittal. It is so ordered.

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA v. FRANK HASHMALL, Defendant.	Criminal No. 1752—50

OPINION OF THE COURT

The Court (Holtzoff, J.): It seems to the Court it would be helpful to recapitulate some of the basic principles regarding the constitutional privilege against self-incrimination, which is one of the time-honored and basic principles of the Bill of Rights. It was made a part of the Bill of Rights as the result of bitter experience known to the Founding Fathers and to the Members of the First Congress which submitted the Bill of Rights for ratification as part of the Constitution.

I refer to the experience in England during the period when many persons were oppressed in connection with criminal prosecutions and were required to incriminate themselves if the authorities saw fit to take that course.

We cannot minimize this constitutional privilege for the sake of obtaining information in any particular instance, no matter how important it is to obtain that information.

The applicable principles in construing and applying the privilege of self-incrimination is that no one can be required to furnish evidence which would tend to convict him of a crime. That privilege, however, is not limited to the specific question as to whether the witness committed a specific crime. It would not be of very much value if it were so limited. And the courts since the day of the decision

by Chief Justice Marshall in the Aaron Burr case have so recognized.

The privilege applies to an endeavor to secure information which would lead to information which would cause a conviction of the witness of some criminal offense. For example, obviously a witness could refuse to answer the question: "Did you commit such and such a murder?" But he could also refuse to answer the question: "Were you at such and such a place at such and such a time?" because that question might place him at the place where the murder was committed, at the moment it was committed, and thereby be a step toward securing his conviction.

The question as to whether a person is a member of the Communist Party, I think is within the privilege, because it was held in the Communist case in New York that the Communist Party or the active members of the Communist Party are a conspiracy to overthrow the Government by force and violence, and that is a criminal offense. So, to ask a person whether he is a member of the Communist Party might lead to securing evidence which would convict him of a conspiracy with others to overthrow the Government.

Of course, the question on its face must appear to be such as would indicate some basis for the assertion of the privilege. The assertion of the privilege must be within reason. A question which is obviously innocuous must be answered.

For example, to ask a person's name and address would not be within the privilege. But if there is any reasonable possibility that one answer or the other might tend to disclosure of incriminating evidence against the witness, it is the witness' choice whether to answer the question or not. As Chief Justice Marshall indicated, the witness cannot be required to disclose his reasons for asserting the privilege, because in doing so he might have to disclose the very information which he has a right to withhold.

This brings me to the specific counts of this indictment. I will first take up Count V.

The question in Count V is: "Whether the defendant testified as a witness for the defendants in the trial referred to in Counts III and IV as to what the Communist Party in the United States stood for and so testified from defendant's own knowledge because of his membership in the Communist Party."

An answer "Yes" would mean that the defendant testified as to what the Communist Party stood for because of his membership in the Communist Party. It would be an admission that he was a member of the Communist Party. He has a right to refuse to make that admission under the Constitution.

Now I go back to Counts III and IV. Counts III and IV involve questions that on their face are perfectly innocuous, and it would have been perhaps better policy if he had answered them. Each of them asks whether he gave certain testimony in the trial of the eleven Communists in New York.

If they stood alone, I would find the defendant guilty of those counts, because obviously he could not possibly incriminate himself by answering either yes or no. However, it is necessary to read these questions in the context in which they were asked.

The defendant, before these questions were asked, had refused to answer whether he was at that time a member of the Communist Party. He refused to answer this question on the ground that to answer it might tend to incriminate him. Admittedly he had the right to assert his privilege, and no contempt of Congress is charged as to that question.

Then a series of questions followed to either induce him to answer that basic question, or else to ascertain why he chose to assert the privilege.

Of course an interrogating tribunal, once the privilege has been asserted, does not have a right to interrogate the witness as to why the privilege is being asserted, because, as has already been said, that might require disclosure of the very information which the witness has a right to withhold.

In the course of these supplemental questions apparently propounded for the purpose of inducing the defendant to answer the question, or in the alternative to get more details as to why he chose to assert his privilege, he was asked a number of questions among which were the questions: Well, didn't you testify so and so at the trial of the eleven Communists? And didn't you testify so and so at that trial? That is the substance of Counts III and IV.

I think in the light of the context he had a right to stop. And when he asserted his privilege and declined to answer the basic question, he had a right to decline to answer any supplemental questions which were directed at him in an effort to induce him to change his attitude in respect to the privilege, or else to ascertain why it was that he was asserting it, or to demonstrate to him that it was foolish for him to assert the privilege.

The Court finds the defendant not guilty.

SUPPLEMENT II

Testimony of Thomas J. Fitzpatrick Before House Un-American Activities Committee— August 10, 1949

After the statement appearing in the text, *supra*, p. 17, counsel for the Committee asked Mr. Fitzpatrick the following question (at p. 602):

> "Mr. Fitzpatrick, are you now or have you ever been a member of the Communist Party?" [1]

The following colloquy then ensued (at p. 603):

> "Mr. Fitzpatrick: Mr. Chairman in my opening remarks I gave quite a bit of my attitude on this question. I say that this Committee has no right to pry into my mind.
>
> "Mr. Woods: We are not concerned with your opinion of the committee. We have asked you a simple question. Do you want to answer it or not?
>
> "Mr. Fitzpatrick: I am answering it, Mr. Chairman.
>
> "Mr. Wood: We don't have the time for a long dissertation.
>
> "Mr. Fitzpatrick: I think I have a right to answer it in my own way.
>
> "Mr. Wood: The question can be answered 'Yes' or 'No', or you can decline to answer it.
>
> "Mr. Fitzpatrick: Being just a common workingman, I will answer it in my own words. I don't think the committee has the right to dictate the choice of my words in answering it.
>
> "Mr. Wood: We are not attempting to do that. You may answer or decline to answer.
>
> "Mr. Fitzpatrick: I will answer the question. The Constitution guarantees the right to me and every other citizen to have beliefs, whether they are popular or unpopular, and to keep them to themselves if they see fit, and I have no intention of being a party to weakening or destroying that protection in the Con-

[1] Count One of the indictment.

stitution. I feel when I take this position that I am one of the real Americans, and not like some of the phonies who appear here.

"Mr. Wood: Now will you answer the question?

"Mr. Fitzpatrick: I have answered the question.

"Mr. Wood: It is not an answer at all.

"Mr. Fitzpatrick: That is my answer.

"Mr. Wood: Do you mean that is the only answer you are going to give?

"Mr. Fitzpatrick: That is the way it has to be answered, according to my conscience.

"Mr. Wood: Is that the only answer you will give the question whether you are now or ever have been a member of the Communist Party?

"Mr. Fitzpatrick: That is the only answer I can conscientiously give you.

"Mr. Tavenner: Mr. Fitzpatrick, you were present yesterday during the testimony here. You heard it stated under oath that you are a member of the Communist Party. Do you deny that accusation?[2]

"Mr. Fitzpatrick: The answer to my previous question is the answer to this question. I have no intention of permitting this committee to abridge my constitutional rights on political opinions, associations, who I work with, who I meet with, what I read or think, or anything of that kind.

"Mr. Tavenner: So, in other words, you refuse to answer the question?

"Mr. Fitzpatrick: I don't refuse to answer the question. I have answered the question."

Thereupon, Mr. Fitzpatrick was again asked whether he had solicited an individual to join the Communist Party.[3] The following colloquy then ensued (at pp. 604-605):

"Mr. Fitzpatrick: Mr. Chairman, if you want to ask me questions about my actions of loyalty, question my loyalty, you have a right to do so and I will answer them. So far as my political opinions, I have stated my position on that. You are asking the same ques-

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[2] Count Two of the indictment.

[3] Count Three of the indictment.

tion in a different way. But if my memory is right, there was no such thing as a Communist Party when that affidavit is supposed to have been.

"Mr. Tavenner: In 1943?

"Mr. Fitzpatrick: I think it was the Communist Political Association then.

"Mr. Tavenner: Was it the Communist Political Association, then, that you tried to get him to join?

"Mr. Fitzpatrick: I have given you my answer.

"Mr. Tavenner: In other words, you will not answer whether you did or did not solicit his membership? [4]

"Mr. Fitzpatrick: I will not talk about my associations and actions with people who I know, what I did, or anything else. I don't think it reflects on my loyalty or disloyalty or anything else.

"Mr. Wood: Mr. Fitzpatrick, did you ever at any time during the year 1943 furnish an application blank and request Clarence D. Copeland to sign and make application for membership in the Communist Political Association or the Communist Party? [5]

"Mr. Fitzpatrick: Mr. Chairman, do I have to give you my answer again?

"Mr. Wood: I just want to know whether you did that one thing.

"Mr. Fitzpatrick: I say if I did or if I did not, regardless of what I did, it is not the affair of this committee to pry into this kind of action.

"Mr. Wood: And for that reason do you decline to answer the question?

"Mr. Fitzpatrick: I stand on the protection of the Constitution, the first and fifth amendments.

"Mr. Wood: And for those reasons decline to answer the question further?

"Mr. Fitzpatrick: I have answered the question.

"Mr. Wood: I say, do you decline to answer it further?

"Mr. Fitzpatrick: I have no further comment on it.

"Mr. Tavenner: Were you a candidate for political office in the State of Pennsylvania in 1948? [6]

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[4] Count Four of the indictment.

[5] Count Five of the indictment.

[6] Count Six of the indictment.

"Mr. Fitzpatrick: Mr. Chairman, for the reasons that I have reiterated more than once, this committee is going beyond its powers to delve into any of my political activities, thoughts, or anything else.

"Mr. Tavenner: Were you endorsed for office by the Daily Worker, the official organ of the Communist Party?[7]

"Mr. Fitzpatrick: I don't know who endorsed who or for what. I have no intention of discussing my political actions or activities with this committee, for the reasons that I have stated before.

"Mr. Tavenner: The Daily Worker of May 25, 1947, page 9, lists you as the signer of a statement sponsored by the Civil Rights Congress opposing attacks on communism. Are you a member of the Civil Rights Congress?

"Mr. Fitzpatrick: I say it is no affair of the committee what organizations I belong to. The previous answer applies.

"Mr. Tavenner: In other words, Mr. Fitzpatrick, you are just determined that you are not going to give any testimony before this committee regarding Communist activities in union 601?

"Mr. Fitzpatrick: I came here and I stated that if you have any questions about any actions that I have committed, I will answer. So far as my beliefs, my political activities, my associations, affiliations, what I read, those are rights guaranteed to me and every other citizen of this Nation.

"Mr. Wood: That is about the fourth time you have repeated that, Mr. Fitzpatrick. You can simplify that and save time by saying on the grounds you have previously given you refuse to answer.

"Mr. Fitzpatrick: Mr. Chairman, if you will talk to your counsel and ask him not to ask the same question in six or seven different ways, he wouldn't be getting six or seven identical answers.

"Mr. Wood: I don't mind getting six or seven identical answers, but I don't like to have six or seven repetitions of grounds for refusing to answer. Do you intend to answer the question or not? If you don't want to answer it you can decline to answer for reasons you have already given.

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[7] Count Seven of the indictment.

"Mr. Fitzpatrick: I know time is short, and I don't want to take up your time more than anybody else. Mr. Chairman, advise your counsel not to repeat the question.

"Mr. Wood: The only way we can seek information is to ask for it.

"Mr. Fitzpatrick: The only way I can answer a question is to answer it when it is asked.

"Mr. Wood: That is your answer?

"Mr. Fitzpatrick: Yes.

"Mr. Tavenner: I have no further questions, Mr. Chairman."

At the close of his testimony, the following colloquy ensued between the witness and Representative Moulder (at p. 607):

"Mr. Moulder: You say you will answer questions about any acts you have committed.

"Mr. Fitzpatrick: That is right.

"Mr. Moulder: Don't you feel the Congress of the United States has a right to interrogate people as to their beliefs and what is their hope for the future in those beliefs?

"Mr. Fitzpatrick: I think the Congress has no such rights, and I think if you will read the Constitution you will see that. Do we have thought control in the United States now? Are you going to convict people on thinking? I think maybe you fellows should read that Constitution.

"Mr. Moulder: That is what you have to do to be a good constitutional lawyer, just read the Constitution."

Testimony of Frank Panzino Before House Un-American Activities Committee— August 10, 1949

"Mr. Tavenner: Have you at any time attended a Communist Party meeting with Tom Fitzpatrick?[8]

"Mr. Panzino: Mr. Chairman, I again refer to my original remarks.

"Mr. Wood: That is all right, but don't refer to them too much. Let's just answer the question.

"Mr. Panzino: The first amendment to the Constitution of the United States, I believe——

"Mr. Wood: Please concede the committee has some knowledge of the Constitution. I don't like to be lectured about what the Constitution provides. Some members of the committee have some faint knowledge of what the Constitution provides, perhaps as much as the witness. Did you attend a Communist Party meeting with Fitzpatrick? That is the question.

"Mr. Panzino: Under the first amendment to the Constitution, which guarantees the right to assembly, I believe that answers the question counsel has asked.

"Mr. Wood: Do I understand you invoke the Constitution as a reason for not answering further?

"Mr. Panzino: I have answered the question.

"Mr. Wood: I will ask you the question myself, and I want a forthright answer or a declination to answer. Have you at any time ever attended a Communist Party meeting with Tom Fitzpatrick?[9]

"Mr. Panzino: Mr. Chairman, I again refer you to the first amendment.

"Mr. Wood: I don't want to be referred to it.

"Mr. Panzino: I have answered the question.

"Mr. Wood: Have you attended such a meeting?

"Mr. Panzino: I have attended many meetings, at my church——

"Mr. Wood: We are not asking you about churches.

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[8] Count One of the indictment.

[9] Count One of the indictment.

"Mr. Panzino: Any meeting I may have attended is my own personal business and my right guaranteed to me under the Constitution of the United States.

"Mr. Wood: Certainly nobody disputes that, but as a matter of fact, did you attend such a meeting?

"Mr. Panzino: I have answered the question to the best of my knowledge.

"Mr. Wood: Let me ask you this: Do you know whether or not you attended such a meeting?

"Mr. Panzino: Mr. Chairman, evidently you asked the question and you want to answer it.

"Mr. Wood: I want you to answer it.

"Mr. Panzino: I have answered it, Mr. Chairman.

"Mr. Harrison: Is that your complete answer?

"Mr. Panzino: That is right.

"Mr. Tavenner: You have spoken of the rights under the Constitution. What do you consider would become of the Constitution if the Communists should gain control in this country?

"Mr. Panzino: I think again, Mr. Chairman, under the fifth amendment, that is my own personal belief. I think there are enough laws in this country to take care of any subversive activities within the Nation.

"Mr. Wood: Do you consider communism as a subversive activity?

"Mr. Panzino: Again I say that what I think is my own business. I will answer that among my friends, my union members, and not——

"Mr. Wood: To this committee?

"Mr. Panzino: To somebody, whether it be this committee or any outside organization, that is trying to destroy the constitutional rights of the American workers.

"Mr. Tavenner: Have you attended Communist Party meetings with Charles Copeland?[10]

"Mr. Panzino: Mr. Chairman——

"Mr. Wood: If you desire to give the same answer you have given to other questions, you may do so.

"Mr. Panzino: I have answered the question.

"Mr. Tavenner: Are you now, or have you ever been, a member of the Communist Party?[11]

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[10] Count Two of the indictment.

[11] Count Three of the indictment.

"Mr. Panzino: Again I say that I have answered the question in my preliminary remarks.

"Mr. Wood: And that is the only answer that you desire to give?

"Mr. Panzino: That, I believe, is the correct answer to give. That is defending the Constitution of the United States.

"Mr. Wood: I asked if that is all the answer you will give?

"Mr. Panzino: I say I have answered the question.

"Mr. Tavenner: Mr. Chairman, I see no value in going into other questions."

Testimony of James J. Matles Before House Un-American Activities Committee— December 5, 1949

The following portions of the record contain the refusals to answer which resulted in the indictment agair t Mr. Matles:

"Mr. Tavenner: Are you acquainted with Esther Tice?[12]

"Mr. Matles: Mr. Chairman, I have listened to Mr. Emspak's testimony, and I am sure you are trying to save time. I do not propose to discuss here my associations or my political affiliations, under the guaranties given to me by the first and fifth amendments to the Constitution, and I am going to try to save as much time for you as I can.

"Mr. Tavenner: You a.e rather jumping to conclusions, I think.

"Mr. Matles: I get it from what you have said that you are trying to save time, so I am helping you along.

"Mr. Tavenner: I am not asking you about the political affiliations of Esther Tice.

"Mr. Matles: I don't want to discuss my associations.

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[12] Count One of the indictment.

"Mr. Tavenner: No matter what type of business associations they may be in the affairs of the union, you will not discuss them?

"Mr. Matles: That is right, because I studied the testimony before this committee, and I find you are trying to use witnesses as finger men.

"Mr. Tavenner: Where is Esther Tice employed?[13]

"Mr. Matles: I have answered that question.

"(Witness confers with his counsel.)

"Mr. Matles: Mr. Chairman, may I have a minute on this question?

"Mr. Tavenner: You mean to consult with counsel?

"Mr. Matles: No, I have consulted with counsel and desire 1 minute to clarify my point of view.

"Mr. Moulder: Very well.

"Mr. Matles: The purpose of this hearing was announced by a representative of this committee, and that was to investigate the activities of officers of the union who have complied with the Taft-Hartley law. As we have known this committee for 12 years, the only reason you would assign yourself such police functions would be to frame us up and smear our organization. I feel Mr. Murray and Mr. Carey had something to do with persuading you to hold these hearings.

"Mr. Moulder: I think you are wrong about that. I don't know either of them. Do you refuse to answer the question?

"Mr. Matles: I have given the basis for answering the question the way I did.

"Mr. Tavenner: Which, of course, is no answer at all.

"Mr. Moulder: You can give any explanation you wish, but don't make a speech.

"Mr. Matles: Do you really think I made a speech, Mr. Congressman?

"Mr. Moulder: Proceed.

"Mr. Tavenner: Mr. Matles, have you ever been a member of the International Workers Order?[14]

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[13] Count Two of the indictment.

[14] Count Three of the indictment.

"Mr. Matles: I have answered that question.

"Mr. Tavenner: When?

"Mr. Matles: Just before.

"Mr. Tavenner: What is it? Were you or were you not?

"Mr. Matles: I will not discuss my affiliations, my associations, or my political beliefs, on the grounds I stated before.

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"Mr. Tavenner: In 1933 you were an organizer for the Steel and Metal Workers Industrial Union, were you not?[15]

"Mr. Matles: My answer is the same.

"Mr. Moulder: You refuse to answer for the reasons stated, that it violates your rights provided under the Constitution?

"Mr. Matles: That is right.

"Mr. Moulder: What are those provisions, do you know?

"Mr. Matles: I believe the first and fifth amendments.

"Mr. Moulder: In what respect do they justify your refusal to answer the question?

"Mr. Matles: I am so advised by counsel.

"Mr. Scribner: I will be happy to give the basis for that if you wish, Mr. Congressman.

"Mr. Tavenner: Was James Lustig also employed as an organizer for the Steel and Metal Workers Industrial Union at the same time you were?[16]

"Mr. Matles: My answer is the same.

"Mr. Tavenner: Mr. Matles, I show you a copy of the Daily Worker dated November 6, 1933, and point out to you that on page 2 under the heading 'Thirty-eight workers organizations endorse Communist Party program' your name appears as Secretary of the Steel and Metal Workers Industrial Union, along with that of James Lustig, as organizer of the Steel and Metal Workers Industrial Union. This article states:

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[15] Count Four of the indictment.

[16] Count Five of the indictment.

"'Only the Communist Party as the party of the working class represents the interests of the entire working population, stands squarely on the principle that the provision of adequate food, clothing, and shelter and the defense of the rights and living standards of the workers are the primary issues in the campaign.'

"I show you that article and ask if you still subscribe to that statement?[17]

"Mr. Matles: Mr. Chairman, I have on many occasions discussed this subject before other congressional committees. I do not care to discuss it before this committee.

"Mr. Moulder: You refuse to answer?

"Mr. Matles: For the reasons I have previously given, I will not discuss my views, my affiliations, or my associations."

Thereafter the witness refused to answer approximately seven questions for the reasons given in the answers quoted above. The refusal to answer one of these seven questions forms the basis of Count Seven of the indictment.

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[17] Count Six of the indictment.